THE

PROCEDURE OF THE CIVIL COURTS

OF THE

EAST INDIA COMPANY

IN THE

PRESIDENCY OF FORT WILLIAM,

IN

REGULAR SUITS.

BENGAL SECRETARIAT LIBRARY.

BY

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PREFACE.

The law of judicial procedure of the Courts of the East India Company was well laid down, in strong clear outline, in the year 1793, when the internal legislation of British India first assumed a systematic form.

Since that time, the cases decided in appeal by the Sudder Dewanny Adawlut, and the Constructions and Circular Orders which it has promulgated, (generally in answer to references from the subordinate Courts) have solved many doubts, supplied many deficiencies, and afforded much illustration; and particular portions of the law have, at different times, been modified by Acts of the Local legislature.

The general result is, however, that upon the basis of the Code of 1793, a system of law has gradually arisen, of which no accurate knowledge can be acquired except by a minute examination of a series of enactments, decisions, orders and constructions issued unconnectedly, from time to time, as occasion required,

and extending over a period of more than half a century.

Such a state of the law would be embarrassing enough in any country, but it is here an inconvenience of the first magnitude, since persons of all races are obliged to assert their rights in the Courts of the Interior, or Mofussil, without any legal assistance that deserves the name, and according to these very rules of procedure, which it is so difficult to ascertain, and yet the observance of which is absolutely prescribed.

Perhaps it might have been otherwise. It is possible that an Officer thoroughly acquainted with the customary laws and tenures, and with the individual character of the natives of a district, might, by patience and impartiality, and by the tact, which a long intimacy with oriental life can sometimes bestow, settle disputes very efficiently, and give high satisfaction to a rural population; his judgments being of course not appealable to higher Officers at a distance, who do not possess the special and scarcely communicable knowledge by which he has been guided.

But such has not been the judicial policy of the able men who formed the Indian Empire. Their enactments shew them to have felt that although it is not desirable at first in provinces recently conquered, to enforce any high degree of accuracy in legal proceedings, yet that it is safer in the end to rely upon institutions, than upon men; and they have established a system which does not depend for its success upon extraordinary individual efforts, but which is susceptible of effective superintendence and development.

It is very plain that wherever there is controversy, it must be conducted according to some rules, or it will never end; wherever there are Courts and Judges, there must be judicial doctrine of some kind, good or bad: and it will in fact be found that the Courts of this country do adhere rigorously, not only to their own decided precedents, and to the enactments which they are bound to obey, but also to certain unwritten rules of practice, which reason and experience have suggested. Indeed, the system has been censured as too rigid and technical,* and whether this criticism be just or not, the fact that it is a system, strictly organized and regulated, is beyond doubt, and it only remains to define that system, and to inquire how it may be maintained and improved.

* The following passage occurs in a paper recently published in the *Calcutta Review*, (Vol. XII., p. 426,) and attributed to a civilian of high character in the North-Western Provinces.

" The petitioners were referred for redress, either to the Civil Courts, or to some future period, when the Revenue Officers would have leisure and authority to enter into such questions. The first of these expedients, and the only one available at the time, viz., that of resort to the Civil Courts, was worse than useless. In the absence of any detailed record of rights, or of the general nature of existing tenures, in the Revenue Department, the Courts could do nothing to remedy the errors, which had been committed. They could only make confusion worse confounded. Situated as they were then, and indeed as they are still, the judicial tribunals of this country are in the worst possible position for building up any system of right, to which they are not guided by the letter of positive enactments. Bound to one spot, tied down by rigid laws of procedure, and debarred (as in these provinces at least they are taught to think themselves) from admitting any evidence but that spontaneously laid before them by the parties, they must necessarily often be misled by packed witnesses, or partial documents. An honest and intelligent bar, the first requisite for diminishing the evil of strict legal forms among an ignorant population, is still wanting in this country. At the best, each new case comes before the Courts in an isolated form, detached from any general principles, or extended experience, and is therefore liable to every species of misconception. They are scattered over the face of the country, without any mutual

The practice and doctrines of the Civil Courts must be deduced, in great measure, from an examination of the decisions at large, both those which have been specially adopted and published as precedents, and those which are issued monthly as a record of the ordinary transactions of the Sudder Court ; for all decisions practically tend to shew by what principles the Court is governed ; and they become law, that is to say, they guide men in their private transactions, and they regulate the decisions of the Courts. No one can make the examination to which I have referred, without perceiving that there is a large body of living doctrine, which appears to mature itself by degrees in the minds of experienced judicial Officers ; but which is not to be met with in any definite form. Yet by this test the judgments of the inferior Courts are necessarily tried, and no small proportion of them* are quashed for erroneous procedure ; frequently with great severity of comment upon the part of the highest tribunal.

Aided by the abundant practical illustration which has of late been afforded by the monthly publication of

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communication, and with no provision for securing uniformity of sentiments, except the precedents furnished by the Sudder Court. These come few and far between, as regards any particular point on which opinions are likely to be divided, while of those which are applicable, some are likely to be erroneous, from causes of which the system, rather than the Judges, should bear the blame. If a poor and uneducated man is perplexed by the forms, harassed by the delays, and crushed by the expense of the inferior Courts, how is it to be expected that he can carry up his case, through all the intermediate stages, so as to lay it fully and efficiently before the tribunal of last resort? The principle involved may therefore suffer from the helplessness of the rightful litigant in the very cases which are to guide future decisions."

* About one-fourth of the Decisions which are appealed from to the Sudder Court.

the decisions of the Sudder Court, (which I fear, are but partially known even to the Judges and practitioners of the subordinate Courts,) I have endeavoured to simplify and condense the scattered law of procedure; to ascertain, and to state as simply as I could, the principles of judicial controversy as understood in this country, from the beginning to the end of a suit; to arrange in natural order and succession all that exists in the form of positive law, on each head; not, in general, quoting regulations in their very words, but stating in a continuous text (a task in which I have been greatly aided by Mr. Marshman's valuable Guide to the Civil Law of the Presidency of Fort William,) the general ect of the whole law, whether expressed in enact- s, constructions, or decisions, or inferrible from dgments; and inserting, where authority fails, and ere are manifest blanks to be filled up, that which in my opinion, right and fair in itself, and likely to sanctioned by the Courts, when they shall be ed upon for a decision.

The authorities upon which I rely have been cited n the margin. They are almost exclusively Indian, r that which has been laid down by Courts or by ext-writers elsewhere, and with reference to other ystems of law, can claim no attention here, except so r as it may be deemed just and reasonable in itself, d not at variance with the law in force in this ntry. Writing chiefly for persons who are not iliar with legal compositions, I offer, upon my own onsibility, and only in the way of suggestion, all matter for which I have not claimed express

sanction. But I have freely availed myself of all aids which were accessible to me, and I must in particular acknowledge my obligations to the Treatises of Lord Redesdale and of Mr. Daniell upon the Procedure of the English Courts of Equity, and to the recent work on Evidence by Mr. Pitt Taylor. I have received a great deal of valuable information from Mr. John Colvin, one of the Judges of the Sudder Dewanny Adawlut of the Lower Provinces, and from Mr. Binny Colvin, the able Registrar of the Court.

It will be observed that the Indian Courts have to deal with difficulties very similar to those which are familiar to the tribunals of other countries, and that the solutions to which they have worked their w are generally pretty much the same; but the m process which they went through has seldom, till late, been fully recorded, and often can only be infe red from the results, and hence it is probable that t decisions to which I have referred may not be dee ed, in every instance, to bear out in its full ext the proposition in support of which I cite them. M object has been simply to discover the principle, th leading thought or doctrine, which really governe the cases cited, and not to examine whether eac decision was in all its parts a correct application the principle. I have designedly omitted sever decisions which appeared to be erroneous and n likely to be followed: and it is probable that pers conversant with the law of the Company's Courts discover many errors and unintentional omissions. which I can only bespeak their indulgence.

My plan does not extend beyond the procedure in regular suits. I have not attempted to give any account of the numerous special remedies which are provided by particular laws, nor of the position of the Courts of Civil Judicature with regard to the Revenue and Criminal Authorities; nor have I noticed at any length the regulations intended for the guidance of Judges as Officers of Government, nor their relations to the Sudder Dewanny Adawlut as a Board for superintending the administration of justice.

The system,—that is to say, the rules and doctrines which together constitute the law of procedure, may be regarded, upon the whole, as a rational and well considered system, though certainly not above the need of improvement.

It is conceded on all hands that the present mode of taking evidence* is extremely bad and cannot be continued; and notwithstanding the extreme difficulty of compelling the attendance of witnesses at the trial of the cause, a difficulty for which, perhaps, sufficient allowance has not been made,—there is reason to believe that in this process, so important to the ends of justice, an improved practice will ere long be enforced.

The execution of decrees is, at present, slow, uncertain and expensive. The difficulty arises, in great measure, from the character of the people, and therefore cannot be easily overcome by any law; but we may reasonably hope to see some amendment, as the Sudder Dewanny Adawlut has entered upon

* See p. 276 infra.

the investigation of the subject, with the intention of submitting a remedial measure to the Legislature.*

Most of the inferior Officers of the Courts are corrupt; their power is considerable, and their salaries are very small; their power may be diminished by closer superintendence, and they may be encouraged to act uprightly by the promotion of the most honest and intelligent of their number to subordinate judicial offices, which many of them would probably be found very competent to fill.

It appears to me, that to adapt the Indian judicial system to the increasing variety and importance of the subjects which are now adjudicated upon, there are needed a more special preparation of the Judges for the exercise of their calling, and a comprehensive statement of the law, in the form of a Code or authoritative digest, which shall not only prescribe the course to be pursued under ordinary circumstances, but shall furnish broad and distinct principles to guide the courts in cases not expressly provided for; not obliging them any longer to "run up and down for their laws," like the French under the old monarchy,† but redeeming as many subjects as possible from the domain of error and uncertainty, and narrowing the range within which corruption or caprice can operate.

It must indeed be difficult to perform rightly the duties of a judicial office in India; for while the

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* See p. 515 infra.

† See Lord Bacon's "Offer of a Digest of the Laws of England."

character of the people is unfavourable to the investigation of truth, their local customs and land tenures are infinitely various, the Regulations relating to them often intricate and difficult, and the law of inheritance creates a great number of distinct interests in almost every piece of property, however simple in its own nature.

The Judges are either covenanted,—English gentlemen of liberal education, who have been employed for many years as executive Officers of the Government; —or uncovenanted,—Europeans or natives, for whom no standard of education is prescribed, although they are subjected to an examination in the Regulations. When a judicial officer of either class sets himself actively to learn his duties, he has to begin at the very beginning; the local pleaders afford him no assistance ; he makes, early in his course, the same mistakes which his predecessors have made, and at the close of his period of service, he ends at the point where under more favourable circumstances he might have begun; his knowledge is lost with him, and he bequeaths the same task to his successor.

Without going so far as to require of the Judges employed throughout the interior, the long devotion to legal study, the " viginti annorum lucubrationes," which have in other times and countries been deemed essential to judicial excellence, it is yet difficult not to lean to the opinion that young men who are intended for the judicial branch of the Civil Service, should, after going through the ordinary course of education, receive a more specifically judicial training; that an opportunity should be afforded them of acquiring,

not indeed a profound knowledge of law, but something of a legal habit of mind, by attendance at the chambers of a practising barrister, and in the Courts, and perhaps also by attending the law lectures recently established in London; that special encouragement should, from the first, be given to those, and to those only, who have exerted themselves with real energy and success in this study, and that they should be earlier familiarized in India with the administration of Civil Justice;* and also that some systematic legal instruction should be given in this country to those who are intended for the profession of a pleader and for subordinate judicial offices;—and that the law, which they administer, should be made accessible and intelligible to all classes of Judges, and to the people whose rights are regulated by it.

It would be idle to argue in support of the study of jurisprudence, which the common consent of all nations has pronounced so important, or to point out that the object to be aimed at, in engaging in such a

* I can scarcely venture to go into detail upon this subject, but it seems probable that after being employed under a Collector for a year or two, at the utmost, they might be employed as assistants to the Registrar of the Sudder Court, or to the Legal Remembrancer; and that the Office of Register might be revived in the mofussil courts, and might be so modified as to ensure a great improvement in the administration of Justice. The Register might be employed, not only in regulating the proceedings of the native officers immediately attached to the court, but also in ascertaining and digesting facts for the court, and in superintending (where necessary) the execution of decrees, instead of the Ameens, who are at present deputed to conduct local inquiries, (See Chap. XXIII.) and to give possession of land; and who are said to exercise their important powers very corruptly.

Above all things, promotion ought not to be a matter of course, but ought to be resolutely withheld from those who have failed to qualify themselves for it.

study, is not merely the acquisition of a knowledge of positive ordinances, but the cultivation of a habit of accurate investigation, of a spirit which shall trace the doctrine upon which ordinances rest, which shall by patient thought discern truth, and admit the authority of better reason, wherever it is to be found. Whatever may be the varieties of human nature and human affairs in different regions, the points of resemblance are infinitely more numerous and important, and there is little danger of the Judges being led astray in their Indian decisions, by analogies drawn from the laws of distant nations: it is therefore very desirable that they should be enabled to keep up an acquaintance through life, with all that is most valuable in the jurisprudence of England and of other states.

But however important the study of jurisprudence, the early employment of the Civil Servants in duties connected with the Civil Courts, is also of great moment. They are required, as Judges, not merely to make declarations of right, but to administer justice, to set right that which is wrong between man and man; which cannot be, unless the details be superintended with vigilance, as well as integrity; nor unless care be taken that the orders be drawn strictly according to the directions of the Judge, and not tampered with after he has declared his mind upon the case; that their issue be not unduly delayed, and that the actual execution of the process and orders of the Court be not oppressively or corruptly conducted. Without some early familiarity with these details, the Judge, not having practised at the bar, can have but an

imperfect knowledge of the mechanism of his own Court, or of the real effect of the orders which he may pronounce.

Some changes might also with advantage be made in the present distribution of judicial duties. In examining the constitution of the Courts,* it is impossible not to be struck with the comparatively unimportant functions of the Zillah Judge. The highest judicial Officer below the Sudder Court possesses indeed an unlimited original jurisdiction, but he tries very few original suits,† and in hearing appeals from the lower Courts, his jurisdiction is limited to cases where the matter in dispute is below 5,000 rupees (or £500) in value. Upon the other hand, his subordinate, the Principal Sudder Ameen, may, and does decide a very large number of cases in appeal, subject (like the Zillah Judge) to no appeal at all from his decision upon the merits, though open to appeal on points of law; in discussing which the higher Court is bound to adopt the facts as found by him; and he exercises original jurisdiction without any limit as to value, subject only to appeal to the Sudder Dewanny Adawlut.

The nature of the jurisdiction, too, is unfavourable to the formation of judicial habits by the Zillah Judge.

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* See Chapter XV., infra.

† See Circular Order No. 18, addressed by the Sudder Court, on September 18th, 1850, to the Civil Judges in the Lower Provinces :

"*To the Civil Judges in the Lower Provinces.*

"The Court having observed that very few original suits are tried by Zillah Judges, direct me to call your attention to the discretion vested in Judges by Section 2, Act IX. of 1844, and desire that you will, from time to time, as the state of your general business will admit, withdraw a certain number of original suits from the files of the Principal Sudder Ameens and Sudder Ameens of your district, and decide them in your own Court."

The Judge of appeal sees a case for the first time after the facts have been investigated and after a decision has been recorded. He is not compelled to go vigorously through the details and to arrange them for himself, and to consider for the first time how they are affected by the law. He does not become patient of detail, and attentive to the smaller, as well as to what seem to be the leading facts. He is more apt to examine whether the decision already passed be correct, than to think independently for himself, how the justice of the case may be best met. The judicial process with him becomes relative, not positive or original. On the other hand, the subordinate Judges, who exercise original jurisdiction, are (even if their information would enable them to take a wider range, which can rarely be the case) scarcely in a position that enables them to act freely upon their views of equity; and they adhere closely to the regulations, content to escape censure. But mere adherence to positive law is apt to become narrow, technical and oppressive, unless corrected by enlightened principles of construction.

It is said, however, that the Civil Servants will not be good Judges unless they have been previously employed for many years in the executive departments of Government, and have thereby acquired a thorough knowledge of the complicated and various tenures of land: and it is urged, not without reason, that the duties of the revenue department are in some degree judicial.

But to say nothing of the opportunities which a Civil Officer would enjoy, while attached in a subordinate character to a Collectorate, or to a Civil Court, of

becoming acquainted with the tenures of land, and the habits of the rural population,—the law of immovable property is very complicated in England and in other countries of Europe, and even the customary tenures are most various; but it is not thought necessary that the Judges or Barristers should be practically employed in any duties at all resembling those of an executive Officer in India. That which is known upon all these subjects, is capable of being reduced into writing; and a Judge who has before him an authoritative exposition of the tenures, based upon the reports of the best executive Officers in every district, will be more able to do justice, nay, in possession of more positive local knowledge, than one whose knowledge is confined to what he has himself seen, in a district differing perhaps in many respects from that in which he is called upon to preside as Judge.

But above all things he will be superior in that, in comparison with which, local knowledge, however valuable, cannot be more than secondary; in the judicial tone which his mind will acquire, by early and continued devotion to legal labours, by which alone the highest Courts of Appeal in Great Britain are enabled to administer justice in the last resort to all her numerous dependencies, though with far less local knowledge than that which is possessed by the tribunals from which the appeal comes.

The majority of the contested cases which come before the Courts,* will be found to turn, not upon

* That is to say, of the cases which occupy the time and attention of the Courts; for the actions for the recovery of small debts are of course the most numerous.

points of Hindoo or Mahomedan Law, but upon questions relating to land, and to the Regulations of Government; which equally arise, whatever may be the faith, or the race, of either of the litigants.

And if the English law were enacted, as the general rule of right throughout India, as a common law, governing all cases which do not fall under the Mahomedan or the Hindoo Law,—(which cannot be done with any prospect of practical advantage unless the law be reduced to a Code) I apprehend that the majority of cases would still relate to the land tenures and regulations.

It is said that a Criminal Code will soon be promulgated, and this encourages the hope that we may one day see a Civil Code, fully digesting all the land tenures and regulations for each province, with a thorough investigation of the principles of equity applicable to each, in the relation of landholders to the Government and to each other, incorporating all that has grown up among the people and all that has been actually decided and settled; a digest in which all existing materials may be reviewed and arranged, and in which the legislature, not misled by, and yet not overlooking or disdaining the analogies afforded by other systems, may give to India that great public work so much wanted and for which the materials have been silently accumulating.

The law, it has been said, is the expression of the general will, and the definition is so far true, that if it expresses that which is contrary to the opinion and feelings of the people, it can never be practically enforced.

The Code therefore, though not excluding wholesome innovation, would probably be framed upon the general principles so well expressed by Sir James Mackintosh,* in characterizing a writer† whom he considers to be "much more remarkable for laying down desirable rules for the determination of rights, and the punishment of wrongs, in general, than for weighing the various circumstances which require them to be modified in different countries and times, in order to render them either more useful, more easily introduced, more generally respected, or more certainly executed. The art of legislation consists in thus applying the principles of jurisprudence to the situation, wants, interests, feelings, opinions, and habits of each distinct community at any given time. It bears the same relation to jurisprudence which the Mechanical arts bear to pure Mathematics. Many of these considerations serve to shew that the sudden establishment of new codes can seldom be practicable or effectual for their purpose; and that reformations though founded on the principles of jurisprudence, ought to be not only adapted to the peculiar interests of a people, but engrafted on their previous usages, and brought into harmony with those national dispositions on which the execution of laws depends. The Romans, under Justinian, adopted at least the true principle, if they did not apply it with sufficient freedom and boldness. They considered the multitude of occasional laws, and the still greater mass of usages,

* Discourse on Ethical Philosophy.

† Mr. Bentham.

opinions and determinations, as the materials of legislation, not precluding, but demanding a systematic arrangement of the whole by the supreme authority. Had the arrangement been more scientific, had there been a bolder examination and a more free reform of many particular branches, a model would have been offered for liberal imitation by modern lawgivers."

The work of course could only be gradually accomplished, but when once accomplished for the Lower Provinces, it would not be difficult to adapt it to the North-Western Provinces, and even, as information gradually comes in, to the Punjaub; and it would in time spread itself all over British India, single in aim and spirit, yet as various and flexible as the subjects to which it would apply.

Such a Digest of Rights would naturally be accompanied by a Code of Procedure both in regular and in summary and special suits, not only in suits purely civil, but in those matters wherein the Criminal and Revenue Regulations intersect the course of civil procedure.

I cannot refrain from adding that I consider the task of translating such a Code to be one of the very highest importance to its popularity, success and usefulness. It is difficult for any legislature to express itself in language so clear that the construction even of the original enactment shall not be immediately a subject of conflict in the Courts. The translation, therefore, will be an inexhaustible source of error, unless it be most carefully executed, and adapted to the habits of thought and expression which prevail among the people for whom it is made.

When the laws shall have been thus composed, and thus translated, this country may with reason be expected to enjoy the benefits anticipated by Lord Bacon from such a work, when he noticed the intention of King James, "to enter into a general amendment of the state of his laws, and to reduce them to more brevity and certainty, that the great hollowness and unsafety in assurances of land and goods may be strengthened, * * * * the execution of many profitable laws revived, the Judge better directed in his sentence, the Counsellor better warranted in his counsel, the student eased in his reading, the contentious suitor that seeketh but vexation disarmed, and the honest suitor that seeketh but to obtain his right relieved; which purpose and intention as it did strike me with great admiration when I heard it, so it might be acknowledged to be one of the most chosen works, and of the highest merit and beneficence towards the subject, that ever entered into the mind of any King."

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ABBREVIATIONS

USED IN REFERENCES TO THE REPORTS.

Sel. Rep.—Select Reports of Cases in the Sudder Dewanny Adawlut.

R. S. C.—Reports of Summary Cases in the Sudder Dewanny Adawlut.

S. D.—Decisions of the Sudder Dewanny Adawlut recorded in English, published Monthly.

Sev. Rep.—Sevestre's Reports of Cases in the Sudder Dewanny Adawlut of the Lower Provinces.

ON THE

PROCEDURE OF THE CIVIL COURTS

IN

REGULAR SUITS.

CHAPTER I.

OF THE PERSONS BY WHOM A SUIT MAY BE INSTITUTED.

SECTION I.

OF THE NATURE OF SUITS.

A CIVIL suit is, properly speaking, an application to a Court of Civil Judicature, for the enforcement of some right or for the redress of some wrong, in respect of which the party so applying cannot obtain his rights without the intervention of the Court.

For the enforcement of certain classes of rights, the Legislature has ordained special and summary modes of procedure. Summary and Special suits.

Regular suits are those in which the applicant professes to found his claim upon the general rules of law, and does not seek the benefit of any of these special enactments. Regular suits.

The procedure in regular suits forms the subject of the present treatise.

I have endeavoured to shew the methods prescribed for the conduct of legal controversy, the investigation of facts, for forming and recording a decision, and for putting men in possession of that which has been adjudged to them. It has formed no part of my design to treat of the far wider subject of the law itself, the beneficial application of which is the great end of all procedure. I have indeed found it impossible wholly to separate topics so closely connected, but any statements which I have made as to substantive rights, are merely secondary, and incidental to my main purpose, the consideration of the manner in which those rights are to be asserted.

SECTION II.

THE GOVERNMENT.

PERSONS of every sort and condition are entitled (with few exceptions) to represent their grievances to the Courts, and to require the Judges to determine, according to law and justice, whether any and what aid shall be granted to them.(*a*) And the Government itself is in the habit of submitting to its Courts, by applications similar to those which proceed from private individuals, any claims which it may desire to enforce, either on behalf of itself or of others.

Suits on behalf of the Government are instituted by the Collector or other Officer within whose department the subject matter of each suit may lie.

They are conducted by the Vakeel of Government, at the public expense, under the direction of the Officer by whom they are instituted.(*b*)

(*a*) Reg. III., 1793, Sec. 1.
(*b*) Ibid. Sec. 16. Reg. XIV., 1793, Secs. 5, 15.

SECTION III.

SOVEREIGN PRINCES OF INDIA.

Sovereign Native Princes.

If a Native Sovereign Prince, whether residing within the British Territories or not, desires to enforce a claim, as an individual, to lands or other things; and if the claim is such as might be heard and determined by the Civil Courts, if the claimant were a private person; the Governor General in Council may order a suit to be instituted, for the enforcement of such claim, in the Court, which would according to ordinary rules be authorized to decide upon the right to the disputed property.(*c*)

Suits how conducted.

Suits of the nature contemplated by this law are carried on by the Collectors of the land revenue, with the aid of the Vakeels of Government, and under the directions of the Board of Revenue, which is furnished by the Governor General in Council with all necessary information and instructions for the conduct of the suit.(*d*)

Native Princes cannot sue for land as part of their dominions.

The law applies to suits instituted by Native Sovereign Princes as individuals, and not to suits in which they claim land as being part of their dominions and as being beyond the limits of the British territory.(*e*) Claims of this kind must be adjusted by negociation between the Native Prince and the Government of India.

Suits by Nazim of Bengal.

Suits on behalf of his Highness the Nazim of Bengal are instituted and conducted by the Agent to the Governor General at Moorshedabad, or by the Officer who for the time being superintends the affairs of the Nizamut on the part of the Governor General.(*f*)

(*c*) Reg. IV., 1812, Sec. 2, Cl. 1.
(*d*) Ibid. Cl. 3.
(*e*) Sel. Rep. 19th Sep. 1848, v. 7, p. 514.
(*f*) Reg. XIX., 1825, Sec. 2. See S. D. 1849, 21st March, p. 75.

SECTION IV.

SOVEREIGNS NOT INDIAN.

Sovereigns not Indian.

If recognized by British Government.

THE sovereign power of a foreign state can sue in the Civil Courts of this country, if that foreign power has been recognized by the British Government, but not otherwise. The fact of a foreign government having been recognized or not, is a matter of public notoriety, and the Judges must act officially upon their knowledge of it without requiring it to be proved before them by the parties to a suit, or, in other words, they must take judicial notice of it. But a foreign Government must sue upon such terms as may enable the Court to do justice to all parties, and therefore it must conform to the Regulations prescribed for private suitors who are not amenable to the jurisdiction of the Court. Those Regulations will be mentioned in their proper place below.(*g*)

SECTION V.

CORPORATIONS.

Indian Corporations.

May sue and be sued collectively.

GENERALLY speaking, all persons on whose behalf any right is sought to be established, ought to come before the Court as plaintiffs. But several Companies, consisting of a large number of shareholders, associated for banking or other purposes, have from time to time been invested, by special Act of the Legislature, with the privilege of suing and being sued by their collective or corporate name, or in the name of their Secretary or other Officer, appointed with that view.

Thus by Acts V. of 1838, the Bengal Bonded Warehouse Association, by VI. of 1839, the Bank of Bengal, by XIX.

(*g*) See infra p. 5.

of 1845, the Assam Company, may sue and be sued by their corporate name; and by XXIII. of 1845, the Union Bank may sue and be sued in the name of their Secretary or Treasurer; and the permission is likely to be further extended.(*h*)

Corporations not Indian.

Similar rights have been granted by the laws of England and of other countries to various associations of men, and such associations may institute suits accordingly in the Courts of this country: but they must be prepared to establish the fact, that the privilege was effectually conferred upon them by the law of the country to which they belong.

SECTION VI.

PERSONS RESIDENT BEYOND THE JURISDICTION.

Persons out of jurisdiction may sue.

THE Courts are open to the complaints even of persons who live beyond the limits of their jurisdiction, unless they are alien enemies, or are resident in the territory of an enemy without a licence or authority from the British Government.

Giving security for costs.

In order, however, to prevent the defendant from being defeated of his right to receive the costs of the suit, in case they should in the end be awarded to him by the Court, plaintiffs residing beyond the jurisdiction are generally required to give security for costs.(*i*)

SECTION VII.

DEPENDANTS OF THE NAZIM OF BENGAL.

Where both parties are dependants of Nazim.

IN complaints brought before any Zillah Court in which it appears either by the petition of complaint or by the application of the Nazim of Bengal or by the representation

(*h*) See Draft Act for registration of Joint Stock Companies, *Calcutta Gazette*, 31st October, 1849.

(*i*) See Chap. XVI.

of the defendant, at or before the time of giving in his or her answer, that both parties are servants or relations of his Excellency, or widows or female descendants of former Nazims of Bengal, the parties are referred for justice to the Nazim, or to any person whom he may appoint to dispense it.(*j*)

SECTION VIII.

PAUPERS.

Poor persons may sue.

ANY person resident within the jurisdiction, and not disqualified from suing by any of the circumstances mentioned below,(*k*) has a right, however poor he may be, to commence proceedings for the enforcement of his claims, without being required to give security for the payment of costs to the opposite party, in case he fails in his suit. But as persons who are very poor cannot bear the ordinary expence of litigation, the law grants to them the indulgence of suing at less cost than others.

Need not give security for costs.

No pauper suit for papers nor for penalties.

This permission is not granted where the suit is brought for the possession or recovery of deeds or papers, or for fines, forfeitures, or pecuniary penalties on account of any breach of the Regulations.

Nor where claim under 64 Rupees.

Nor for damages for personal injuries.

Nor where value of the thing claimed is less than 64 Rupees; nor if the claim be for damages of a personal nature on account of loss of caste, slander, abusive language, assault, or personal injuries of any description.

The prohibition, however, does not extend to suits in respect of injury done to property, as for instance to suits by khoodkhast ryots for damages sustained in consequence of ejectment, or claims for damages on account of being deprived of water required for the purpose of irrigation.(*l*)

Petition to sue as a pauper.

A person who desires to institute an original suit as a pauper, must, whatever his rank may be, and whether he sues

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(*j*) Reg. XVI., 1793, Sec. 10.

(*k*) Infra, Chap II.

(*l*) Reg. XXVIII., 1814, Secs. 3, 4, Con. No. 919, West.C., 5th December, Cal. C. 26th December, 1834.

in his own right or on behalf of a disqualified person,(*m*) appear personally before the Judge of the Zillah, who is alone competent to entertain such applications.(*n*) To this Officer, the applicant presents a petition written on the stamped paper precribed for miscellaneous petitions by Regulation X., 1829. If, however, the party be a female of a rank which precludes her personal attendance in Court, the petition may be presented by a Mookhtar or Agent duly authorized for that purpose.(*o*)

Personal appearance in Court.

The petition contains a general statement of the nature and grounds of the demand, of the value(*p*) of the thing claimed of the name of the person or persons whom the petitioner intends to sue; and a schedule of the whole real and personal property of the petitioner, with its estimated value.(*q*)

Contents of the petition.

The Court in which the petition has been presented, then inquires whether there is probable cause for instituting the suit. This inquiry is conducted by the Judge in person, and cannot be delegated by him to any other authority.(*r*) He must satisfy himself on this head by the examination of the petitioner, or of his or her Agents, or witnesses. The personal presence of the petitioner, even if a male, is not required.(*s*) The examination is taken upon oath, or on solemn affirmation in cases where a solemn affirmation may be received instead of an oath.(*t*)

Preliminary inquiry into the merits.

Petitioner need not attend.

In deciding whether there be probable cause for instituting a suit, the Judge would of course be unfavorably influenced by contradictory statements made by the applicant himself on material points which he ought to be acquainted with,(*u*) or by very great delay in bringing forward the claim, because such delay may, when combined with other circumstances, afford a

(*m*) See Con. No. 1254, Cal. C. 4th October, West. C. 8th November, 1839.

(*n*) Act IX. of 1839, Cir. Ord., No. 27, 11th August, 1843, R. S. C. 25th August, 1846, p. 83.

(*o*) Reg. XXVIII., 1814, Sec. 5, Cl. 1.

(*p*) See infra, Chap. XIV.

(*q*) Reg. XXVIII., 1814, Sec. 5, Cl. 2.

(*r*) Cir. Ord. No. 27, 11th Aug., 1843.

(*s*) Act IX., 1839. R. S. C. 19th July, 1847, p. 112.

(*t*) Act IX., 1839, Sec. 1, Con. No. 1285, West. C. 7th August, Cal. C. 7th September, 1840.

(*u*) R. S. C. 11th January, 1847, p. 89.

presumption that the suit has no good grounds; but lapse of time, not amounting to a period which would bar(*v*) the institution of an ordinary suit, is not alone a sufficient reason for rejecting an application for leave to sue as a pauper.(*w*)

A second application is in the nature of a review.

If the Court is not satisfied that there is probable cause for instituting the suit, it rejects the petition; and after such rejection the Judge cannot admit of his own authority, a second application from the same party relating to the same matter, even although such application may shew fresh grounds for the institution of the suit, or may supply any omission or correct any thing which has led to the rejection of the first application. The application is dealt with as a petition for a review of judgment.(*x*)

If the Judge is satisfied that there is probable cause for instituting the suit, he either proceeds to inquire whether the petitioner be really a pauper, and admits, or rejects the petition according to the result of the inquiry,(*y*) or he refers the petition to the Principal Sudder Ameen, who, after investigating the question of poverty, admits or rejects the application, subject to appeal to the Zillah Judge.(*z*)

Inquiry into poverty.

The Judge or the Principal Sudder Ameen who is charged with the inquiry, proceeds to take, in person or by his Officer, the personal examination of the petitioner, or if the petitioner be a female of rank, the examination of her Agent, with reference to the matters contained in the petition, and interrogates him particularly with respect to any real or personal property, which the petitioner may have recently sold, mortgaged, transferred, or otherwise disposed of. The examination may be taken upon oath, but is more commonly taken upon a solemn declaration, under the general law with regard to declarations in lieu of oaths.(*a*)

Personal attendance required.

No male petitioner is exempted from personal attendance upon this occasion, whatever may be his rank.(*b*)

(*v*) See infra, Chap. IX.

(*w*) R. S. C. 22nd April, 1844, p. 58.

(*x*) Con. No. 1229, West. C. 5th July, and Cal. C. 2nd August, 1839.

(*y*) Reg. XXIII., 1814.

(*z*) Act XXV., 1837, Sec. 8, Cir. Ord., No. 27, 11th August, 1843.

(*a*) Reg. XXVIII., 1814, Sec. 5, Cl. 3.

(*b*) R. S. C. 19th July, 1847, p. 112.

Petitioner to be admonished.

In taking the examination of the petitioner or agent, it is the duty of the Court to admonish him, that any wilful misrepresentation or falsehood, or the fraudulent concealment of any material fact regarding the property in the petitioner's possession, or the recent transfer of such property, will subject him to be tried and punished for perjury. The petitioner or agent subscribes his examination, which is then authenticated by the Court.(*c*)

If upon the examination, it appears that the petitioner is possessed of property sufficient to defray the expenses of the suit, or that he has recently sold, mortgaged, or otherwise transferred any property with the view of being admitted to sue as a pauper, the Court at once refuses to admit his suit in that form.(*d*)

But the possession of property by a father, a guardian, or a husband, is no bar to the institution of a pauper suit by or on behalf of the son, or ward, or wife—if the latter be without property,(*e*) and if the suit be not for the direct benefit of the party who possesses property.

Notice to adverse party.

If there be reason to suspect that the petitioner is possessed of property, or has recently transferred any property beyond that which he may have acknowledged or stated in his petition and examination, the Court may issue a notice to the adverse party, signifying that if he appears within a period fixed by the Court, he may shew cause why the plaintiff should not be allowed to sue as a pauper.(*f*)

The notice is in the following form.(*g*)

In the Court of Dewanny Adawlut for the Zillah of

To of in

Whereas has applied to be allowed to institute a suit against you *in formâ pauperis*, for the recovery of

(*c*) Reg. XXVIII., 1814, Sec. 5, Cl. 4.

(*d*) Ibid, Sec. 5. Cl. 5.

(*e*) R. S. C. 7th September 1846, p. 85; 11th September 1843, p. 52; 15th December 1845, p. 73.

(*f*) Reg. XXVIII., 1814, Sec. 5, Cl. 6.

(*g*) Cir. Ord. 9th June 1848.

rupees and the application has been transferred to the Principal Sudder Ameen of this district, for enquiry into the pauperism of the applicant.

Take notice, therefore, that on your appearing before the said Principal Sudder Ameen, on the day of 1850, in person or by Vakeel, you shall be permitted, under Clause 6, Section 5, Regulation XXVIII. of 1814, to shew cause why the applicant should not be allowed to sue as a pauper, and you are hereby required to acknowledge the receipt of this notice. Given under my hand and the seal of this Court, this day of 1850.

(L. S.) A. B., *Judge.*

If the opposite party comes in, even without such notice, and desires to be heard, the Court is bound to hear his objections before it admits the petitioner to sue as a pauper.(*h*)

Local inquiry.

The Court may also summon witnesses, or may institute a local enquiry in the neighbourhood of the petitioner's residence by an ordinary authorized Officer of its own, a Moonsiff deputed to act ministerially, or an Ameen of the class employed in local and particular inquiries;(*i*) with the view of ascertaining whether the petitioner has recently transferred, or is possessed of, any property beyond that stated in his examination. If by such inquiry, or at a subsequent period, it should be established that the petitioner, or the agent of a female petitioner, has been guilty of wilful perjury in his examination, the Court will not only refuse the prayer of the petition, (or nonsuit the plaintiff if the cause be depending) but will cause the guilty person to be committed to take his trial for perjury.(*j*)

In what case permission granted.

If none of these objections(*k*) exist, and if the petitioner does not appear to be possessed of sufficient property to defray the expenses of the suit, the Judge, or the Principal Sudder Ameen,(*l*) to whom the petition stands referred, admits him to

(*h*) R. S. C. 21st November 1834, p. 2.
(*i*) Infra, Chap. XXIII.
(*j*) Reg. XXVIII., 1814, Sec. 5, Cl. 7.
(*k*) Ibid, Cls. 5 and 7.
(*l*) Reg. XIII., 1824, Sec. 4, Cl. 4.

sue as a pauper on his finding two good and sufficient sureties, (both of whom must be householders,) for his appearance whenever his attendance may be required by the Court.(*m*) The surety bonds must be written on paper bearing the usual stamp.(*n*)

Security taken for appearance.

The Judge is not authorized to demand sureties for the appearance of the agent of a female pauper plaintiff.(*o*)

Not in case of female.

The advantages and the penalties connected with this manner of suing will be mentioned in their proper places hereafter.

(*m*) Reg. XXVIII., 1814, Sec. 6, Cl. 1.

(*n*) Con. 1063, Cal. and West. C. 23rd December 1836, Con. 1132, West. C. 16th February, Cal. C. 9th March, 1838.

(*o*) Con. 777, Cal. C. 6th April, West. C. 3rd May, 1833.

CHAPTER II.

PERSONS DISQUALIFIED FROM SUING.

Alien may sue.

AN alien, that is a person not subject to the British Government of India, nor to the British Crown, may generally sue in the Courts of this country for the enforcement of his rights.

Alien enemy cannot sue.

But according to the received opinion on this subject, aliens are not entitled while in a state of enmity, to receive the aid of the Civil Courts, either in the institution of a suit or in carrying on a suit commenced before the state of enmity began.

Who is alien enemy.

Alien enemies are persons of a nation at war with our Government, or who though natives of a neutral or friendly state, reside and carry on trade in a hostile country, or who do so, being subjects of our Government, without a licence from it.

This disability extends to all cases in which an alien enemy is interested, although his name does not appear in the transaction. The right of an alien to institute a suit relating to a contract is only suspended by war, if the contract was entered into previous to the commencement of the war; and it may be enforced upon the restoration of peace. But it cannot be enforced if it was entered into during the war, unless the alien enemy was a prisoner of the British Government at the time of the contract.

Alien friend may sue.

If a subject of a hostile power resides in the British dominions by permission of the British Government, he is considered a friend and is under no disability to sue so long as he behaves peaceably.

Objection not favored.

The Courts do not readily entertain objections on this head, and will not listen to them unless urged by the defendant at the earliest possible stage of a suit.

CHAPTER III.

PERSONS DISQUALIFIED FROM SUING ALONE.

SECTION I.

PERSONS NATURALLY DISQUALIFIED.

Every suit to be conducted by some person of discretion.

IN order that justice may be done, it is necessary that suits be conducted with discretion and intelligence, and if the suitor does not possess these qualities, he must be aided by some person who is capable of forming a judgment as to the necessity of applying to the tribunals for protection or redress, and who may be responsible to them that the suit has not been improperly instituted.

Periods of minority.

The laws and customs of every country have fixed upon particular periods at which persons are presumed to be capable of acting with reason and discretion. Persons who have not attained this age are called minors.

In Hindoo and Mahomedan proprietors.

The minority of Hindoo and Mahomedan proprietors of estates paying revenue to Government, and of proprietors of joint undivided estates for which the law(*p*) requires a manager to be appointed by the proprietors, extends to the end of the 18th year, without distinction of sex.(*q*)

The tendency among Eastern nations has been to determine the age of majority in each case, according to the degree of maturity which the individual may have attained. But as this doctrine would lead (especially in cases where minority is pleaded in bar of the law of limitation)(*r*) to difficult investigations, long after the time has gone by, it is necessary under

(*p*) Reg. VIII., 1793, Sec. 23.

(*q*) Reg. XXVI., 1793, Secs. 2, 3; R. S. C. 28th January 1837, p. 13.

(*r*) Infra, Chap. IX.

every regular system of law to fix some age after which a person is to be held civilly responsible for his acts or omissions.

In Hindoos and Mahomedans generally.

The full age of Hindoos and Mahomedans not under the Court of Wards may be stated generally to be sixteen years complete.(s)

In Armenians.

Male Armenians would probably be considered as of full age at eighteen.

The Vicar of the Armenian Church at Calcutta, on being asked by the Sudder Court what was the age of legal majority in females under the Armenian law, and whether a minor wife was considered to be under the tutelage of her husband; replied(t) that "the age of majority with females is considered to be the age of marriage; and the age of marriage commences from the twelfth year. The wife, being either a minor or of full age, remains under the tutelage of her husband." It is difficult to infer any thing certain from this response, unless the Vicar is to be understood as speaking of a female married under the age which the Armenian law regards as the age of marriage; for if the age of marriage be the age of majority, a married woman cannot be a minor.

In nations not Indian.

Twenty-one is the full age by the laws of England, of Spain, and of the United States of America; and also by the law which now prevails in France, Belgium and Holland; but in the three countries last mentioned, a minor is emancipated and obtains majority at once, by marriage; or if he has completed his fifteenth year, by a judicial declaration of the father, or if he be dead, of the mother.

In East Indians.

In the absence of any recognized general law of British India, it seems reasonable that persons of European extraction should be governed by the laws of the nation from which they derive their origin.

(s) Sel. Rep. 26th April 1831, v. 5, p. 114, 23rd March 1833, v. 5, pp. 276, 280, Macnaghten's Mahomedan Law, p. 62, and see Reg. XXVI., 1793, Reg. VII., 1819.

(t) 20th April 1836.

It appears, however, that in a recent case(*u*) a person, who may be presumed to have been of English origin though of the class called East Indians, petitioned to be put in possession of certain property bequeathed to him, on the ground "that he had attained the legal age of majority, viz., 18 years," and the Sudder Court did not, as might have been expected, negative his pretension to be considered as of full age at 18, but rejected his application on the narrower ground that it was presumable from the language of the will under which he claimed the property, that the age of 21 was contemplated by the testatrix as the period of the petitioner's majority.

Where the estate of a minor landholder is under the management of the Court of Wards, the guardian or manager acting under the orders of the Court, should in all cases affecting the estate, real or personal, institute and conduct such suits as may be necessary, under the instructions which he may receive from the Court of Wards. He has no right to command the aid of the Government pleader.(*v*)

Who sues for minors under Court of Wards.

In the case of a minor whose estate is not under the Court of Wards, the executor of the person under whose will the minor is entitled to the property, or the legal guardian of the minor, must stand in his place, and be subject to all the rules of suit and defence to which the minor himself would be subject were he not a minor.(*w*)

For minor not under Court of Wards.

The legal guardian, however, is not the only person who is entitled to sue on behalf of a minor, for it may be doubtful who is the legal guardian, or the guardian himself may be the person who withholds the right, or does the injury; or he may neglect to give needful protection to the minor.

And therefore it has been laid down that any friend of a minor, whether his regular guardian or not, may sue on his behalf to establish his right.(*x*)

Any one may sue for minor.

(*u*) R. S. C. 14th April 1842, p. 27.

(*v*) Reg. X., 1793, Sec. 32, Cl. 1, Con. No. 335, 2nd February 1821.

(*w*) Con. No. 335, 2nd February 1821, and see p. 9, Supra.

(*x*) R. S. C. 17th July 1847, p. 108.

Exception.

*This liberty, however, can scarcely be considered to apply to cases in which a person who is not legal guardian claims to receive money on behalf of a minor.

Where the law has indicated the person entitled to take possession of the estate of an intestate on behalf of an infant heir, the Court has refused to entertain a suit brought on behalf of the heir for a sum of money, part of the estate, by a person not so entitled.(*y*)

The consent of the minor to the institution of a suit on his behalf is unnecessary.

Lunatics, Idiots, &c.

The rights of lunatics, idiots, and other persons, disqualified for the management of their own concerns in consequence of natural defects and infirmities, are enforced in the same manner as the rights of infants.

SECTION II.

PERSONS DISQUALIFIED BY POSITION—ENGLISH MARRIED WOMEN.

Hindoo or Mahomedan women may sue alone.

A HINDOO or Mahomedan married woman is at all times competent to sue as if she were unmarried,(*z*) even to sue her husband.(*a*)

Armenian.

An Armenian woman may likewise do so.(*b*)

English husband must associate wife with him in suit for her property.

In the view of the Courts of England, the husband and his wife by marriage become one, and the husband may take possession of the property of his wife. But where it becomes necessary to sue for property belonging to the wife, then, whether the right to the property accrued before or after marriage, the suit must be commenced and carried on in the joint names of husband and wife, in order that the Court may protect the

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(*y*) Sel. Rep. 20th September, 1848, v. 7, p. 559, Reg. V., 1799, Sec. 3, and see Sel. Rep. 12th May 1812, v. 2, p. 14.

(*z*) 1 Sev. 107.

(*a*) Sel. Rep. 8th March, 1817, v. 2, p. 233.

(*b*) Sel. Rep. 17th August, 1848, v. 7. p. 528.

wife, who cannot take care of her own rights, and may cause a reasonable portion of the property, (if it be personal or movable property) to be settled upon her and her children, unless she, being separately examined, chooses to give up the right on behalf of herself and her children, and to acquiesce in the property being given to the husband.

Where wife may sue alone.

But the wife may sue alone if her husband can be considered as having undergone a civil death, as where he has been transported for life, or has been attainted of treason or felony, and banished for life by an Act of the Legislature, or where he is an alien and not present within the limits of the Court's jurisdiction.

Where she sues by next friend.

Wherever the interests of the wife are in opposition to the claims of her husband, she ought to sue, not jointly with her husband, (for he being a party complained of, the complaint cannot be made by him) but under the protection of some other person, who exhibits the plaint in her name, and is styled her next friend; the wife's consent is necessary to the institution of the suit.

The friend through whom a married woman asserts her rights against her husband, cannot sue as a pauper.

The law applicable to suits by married females of the class of East Indians of British descent, is not expressly laid down, but it may be presumed that the Courts would regard the marriage of such females as involving all the civil consequences of English marriage.

CHAPTER IV.

OF THE PERSONS AGAINST WHOM A SUIT MAY BE INSTITUTED.

SECTION I.

All persons interested.

A SUIT may be instituted against all persons and corporate societies whatever, who are in any way interested in the matter in litigation: wheresoever such persons may have been born, and from whatever race or family they may be descended, and wherever such corporate societies may exist.

With the exception of certain privileged persons who will be mentioned below, all are subject to the jurisdiction of the Civil Courts.(c)

SECTION II.

THE QUEEN.

If the Queen is in actual possession of the property in dispute, or if any title is vested in her, which the suit seeks to divest her of, a plaint ought not to be filed, but the party claiming ought to apply for relief to the Queen herself by petition; when directions will be given that some one on the part of the Crown shall be made a party to the suit.

SECTION III.

THE GOVERNMENT.

The Government, in its own name, or in that of the Board of Revenue or the Collector, may be made a defendant in any

(c) Reg. III., 1793, Sec. 7; Act XXIII., 1843.

suit. The different Officers of Government may, as such, be made defendants in suits relating to their several departments, under the restrictions prescribed by the Regulations and more particularly referred to below; which generally require that application shall, in the first instance, have been made to the Government officers for redress.(*d*)

SECTION IV.

SOVEREIGN PRINCES OF INDIA.

If a suit be instituted by any person for the recovery of lands or other things over which, by the general constitution of the country, the Civil Courts possess jurisdiction, but which are in the occupancy of any Native Prince, whom it would be improper to require to defend the action himself, (*i. e.*, any Native Sovereign Prince whether residing within the British territories or otherwise) the Governor General in Council has the power to order such suit to be defended by Officers of Government. In such suits the defence is conducted in the manner mentioned above.(*e*)

Suits instituted against the Nazim of Bengal are defended by the Governor General's Agent at Moorshedabad.(*f*) As to the Nawaub of Furruckabad, see Regulation II., 1803, Section 8. As to the Rajah of Benares, see Regulations VIII., 1795, and XV., 1795.

Civil claims against independent chiefs, whether by their own subjects or by others, cannot be taken cognizance of by the Courts.(*g*)

(*d*) Reg. XIII., 1816, Sec. 18; Reg., X. 1819, Sec. 13, Cls. 2, 3, 4, 5, 7.

(*e*) Supra, p. 3. Reg. IV., 1812, Sec.2, Cls. 1, 2, 3.

(*f*) Reg. XIX., 1825, Sec. 3.

(*g*) Cir. Ord., 4th March, 1836.

SECTION V.

CORPORATIONS.

A CORPORATE association is sued in the manner prescribed by the act of incorporation; the manner of suing where internal dissension arises is stated below, Chap. XI.

SECTION VI.

PERSONS RESIDENT BEYOND THE JURISDICTION.

A PLAINT may be filed against a person, alone or jointly with others, although he be resident in a foreign country.

SECTION VII.

DEPENDANTS OF THE NAZIM AND OF OTHER CHIEFS.

Dependants of the Nazim of Bengal.

INFORMATION has been already(*h*) given as to the disposal of suits in which both parties are dependants of the Nazim of Bengal.

Upon a complaint being preferred against any servant of his Excellency by persons of a different description, the Court either refers it to the Nazim for decision or hears it in the ordinary manner, according to its discretion, taking care to pay every proper attention to the dignity and established rights of the Nazim. But if either plaintiff or defendant prefers the jurisdiction of the Court, the case is proceeded with upon the ordinary footing.(*i*)

Of the Nawaub of Furruckabad.

Whoever wishes to prefer a claim against any of the dependants of the Nawaub of Furruckabad, being servants or

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(*h*) Supra, p. 9.

(*i*) Reg. XVI., 1793, Sec. 10; see S. D. 1848, 28th June, p. 595.

relations of that personage or widows or female descendants of a former Nawaub,(*j*) must in the first instance file a plaint in the Court of the Zillah Judge, who refers it to the Nawaub,(*k*) or, if he be a minor, to his guardian or principal manager.(*l*) In the event of the complainant not receiving speedy justice (a point upon which the opinion of the Zillah Judge after hearing the plaintiff is conclusive,) the suit is received and decided in the Civil Court.(*m*)

Of the Rajah of Benares.

For the special rules as to suits against the Rajah of Benares and his connexions, and as to the appointment of Native Commissioners to determine disputes relating to land and revenue within the hereditary mehals of that Prince, see Regulation VIII., 1795, Section 10; Regulation XV., 1795, Section 3, Clauses 1 and 2; Regulation VII., 1828; Construction 1224, Western Court, 14th June, Calcutta Court, 12th July, 1839.

Of independent Chiefs in general.

In civil claims against servants of independent Chiefs, in general, the complainant, whether a chief or not, is left to seek justice from the legitimate superior of the party against whom his claim is preferred, unless that party be resident or possess property within the territories of the British Government.(*n*)

If the defendant be resident within the British territory, he is of course amenable to justice like other residents. If he is not so resident, but possesses property within the British territory, he is precisely in the same situation as any other defendant who resides out of the jurisdiction of the Courts, but has property within the jurisdiction.(*o*)

(*j*) Government Order, 15th June, 1834, No. 1.

(*k*) Reg. II., 1803, Sec. 8; Con. No. 843, West. C., 8th November, Cal. C., 29th November, 1833.

(*l*) Con. No. 162, 26th May, 1814; Con. No. 785, Cal. C., 31st May, 1833.

(*m*) Con. No. 843, West. C., 8th November, Cal. C., 29th November, 1833.

(*n*) Cir. Ord. 4th March, 1836.

(*o*) Infra, Chap. XVI.

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SECTION VIII.

PAUPERS.

JUSTICE may be sought against persons who are wholly without property, in like manner as against the rich. The facilities which are afforded to paupers in making their defence will be stated below.(*p*)

(*p*) Infra, Chap. XVII.

CHAPTER V.

PERSONS WHO CANNOT DEFEND A SUIT ALONE.

A MINOR, an idiot, or a lunatic, or any person disqualified for the management of his own concerns in consequence of natural defects and infirmities, may be made defendant to a suit; but land owners disqualified by minority or otherwise, and having guardians, can only be sued under the protection and joint name of their guardians, who conduct the defence under the instructions of the Court of Wards.(q) In case of a minor whose estate is not under the Court of Wards, the executor or guardian conducts the defence, as already stated;(r) and in the case of an idiot or a lunatic whose estate is not under the Court of Wards, some guardian or manager ought to be joined with him and to conduct the defence in his stead.

Disqualified persons under Court of Wards.

Not under Court of Wards.

A Hindoo or Mahomedan married female may be made defendant in a suit without joining her husband.

Married woman.

An Armenian female who has separate property may be sued apart from her husband.

According to English law a wife may be made a defendant without her husband in those cases in which she may be a plaintiff without her husband; but it is not necessary to join any person with her as her guardian or next friend for the defence of the suit, since the plaintiff is the person responsible for the propriety of its institution.

An Armenian female whose property is entirely in the possession of her husband ought to be joined with her husband in an action against her for a wrong done by her, for the hus-

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(q) Reg. X., 1793, Sec. 32, Cl. 1; Con. No. 335, 2nd February, 1821.

(r) Supra p.

band alone has the means of making good any payment which may be awarded against her.(*s*)

Where English husband and wife answer separately

By the English law, where a husband and wife are living separate from each other, the husband may obtain permission from the Court to answer separately, and he will not be responsible for a wrongful act of the wife—as if the wife should have forcibly possessed herself of property, and it is sought from her by a civil action:—on the other hand, where a wife lives separate from her husband, or disapproves of the defence which he intends to make, or claims some interest adversely to him, she usually receives permission to answer separately.

(*s*) S. D., 1847, June 16, p. 258.

CHAPTER VI.

FOR WHAT THINGS SUIT MAY BE BROUGHT.

THE Civil Courts are empowered(*t*) to take cognizance of all suits and complaints respecting the succession or right to real or personal property, land-rents, revenues, debts, accounts, contracts, partnerships, marriage, caste, claims to damages for injuries, and generally of all suits and complaints of a civil nature.

There is therefore (subject to certain specified exceptions) no description of civil right, for the enforcement of which a remedy may not be afforded by the Civil Courts.(*u*)

Disputes between landlord and tenant.

The Courts have power to determine all questions between landlord and tenant, whether the rights which they respectively claim be founded upon written engagements, upon the laws and regulations, or upon general or local usage :(*v*) all disputes arising between ryots or occupying tenants, and the persons from whom they may be entitled to demand pottahs, or leases; regarding the rates of the pottahs, whether the rent be payable in money or in kind.(*w*)

Claims of Government to lands in decennial settlement.

They have exclusive jurisdiction over the claims of Government to lands included in the decennial settlement.(*x*) They

(*t*) Reg. III., 1793, Sec. 8; Benares Reg. VII. 1795, Sec. 7; Ced. and Conq. Prov. Reg. II., 1802, Sec. 5; Act XI., 1836, Secs. 1, 2.

(*u*) See (e. g.) S. D. 1847, pp. 130, 190, 264, 290, 321, 325, 345, 436, 461, 471, 475, 476, 258, 106; S. D. 1848, pp. 135, 137, 203, 336, 317, 483, 606, 817, 486, 433, 253; S. D. 1849, pp. 197, 260.

(*v*) Reg. VII., 1799, Sec. 5, Cl. 8, Benares Reg. V., 1800, Sec. 14, Cl. 8, Ced. and Con. Prov. Reg. XXVIII., 1803, Sec. 32, Cl. 8; Sel. Rep. v. 7, p. 163.

(*w*) Reg. IV., 1794, Sec. 6; Benares Reg. LI.. 1795, Sec. 9; Ced. and Con. Prov. Reg. XXX. 1803, Sec. 9; Reg. IV. 1794, Sec. 7; Benares Reg. LI. 1795, Sec. 10.

(*x*) Sel. Rep. 30th August, 1815, v. 2, p. 156.

Suit on foreign judgment.

may entertain suits to set aside the resumption of lakhiraj or rent-free lands, by the revenue authorities (that is to say, the determination of the rent-free tenure of such lands, and their subjection to Government rent, or land tax,) where such resumption took place before the enactment of Regulation II., 1819.(*y*)

A suit may be brought in the Civil Courts for the recovery of a sum awarded by the judgment of a foreign Court: the decree of the foreign Court being the cause of action.

Husband and wife.

A claim to the personal custody of a woman, on the ground that she is the wife of the complainant, is cognizable by the Civil Court; and the marriage must be proved in that Court.(*z*)

Damages for act already punished criminally.

The Civil Court may also entertain(*a*) a claim of damages in respect of pecuniary losses alleged to have been sustained by the abduction of the wife of the complainant, notwithstanding that the abducer may have been punished by the Criminal Court: or a claim of damages sustained by reason of the defendant having preferred a false charge against the plaintiff in the Criminal Court. Such a charge may have injured the plaintiff by defaming his character, or by causing his wrongful imprisonment, or in both ways: and it is no bar to a claim of this nature, that the defendant has already been fined by the Criminal Court for his false charge; for although such a sentence of the Criminal Court may tend to clear the character of the plaintiff, yet fines are inflicted solely to vindicate public justice, and afford no compensation for personal injury.(*b*)

Defamation and false imprisonment.

Claims against Officers of Government.

Collectors of the Revenue, Salt Agents, the Collectors of the Customs, the Mint and Assay Masters, and the Assistants and Native Officers of all such functionaries, are amenable to the Zillah Court within the jurisdiction of which they

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(*y*) Sel. Rep. 16th August, 1836, v. 6, p. 100, infra, p. 32.

(*z*) Con. 148, 31st March, 1814, S. D. 1848, 12th February, p. 77, 5th September, p. 795.

(*a*) Con. 1251, 1st November, 1839.

(*b*) See Sel. Rep. 27th May, 1848, v. 7, p. 507. Ibid, 8th June, p. 508.

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may reside or carry on the public business, for any acts done in their official capacity, in opposition to the Regulations.(c)

Under Regulation XIV., 1793, Section 33, a Collector is in his fiscal capacity amenable to the Civil Courts for official acts contrary to that Regulation.(d)

Claim to trusteeship of charity.

Where the trustee or incumbent of a Mahomedan or a Hindu religious endowment has been removed from office by the Revenue authorities or local agents, whose duty it is under Regulation XIX., 1810, to see to the proper application of the fund, according to the intent of the grantor, the Civil Court is competent to entertain a suit by him for restoration: and it seems that if the local authorities can establish to the satisfaction of the Court, that he has misappropriated the funds or is personally disqualified for the office, they may obtain an order for his removal.(e)

If a member of a tribe interrupt and resist the heads of the tribe in the exercise of privileges to which the latter as such heads are entitled, the Court can take cognizance of an action by the heads, for the recovery of damages in respect of the interruption, and for the recognition of their privileges.(f)

Suit to supply defect in a decree.

A suit may be brought to supply an evident defect in a former decree. As, where a lower Court has adjudged a certain sum to the plaintiff, and the Court of Appeal has simply confirmed the decision, but has accidentally omitted to allow interest for the period intervening between the two decisions.(g)

Suits for reversal of order of Revenue Authorities.

If arbitrators make an award of law under Regulation IX., 1833, and the Superintendent of Revenue overrules that award, a suit cannot be brought for the purpose of confirming the award: but a suit may be brought for the possession of

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(c) Reg. III., 1793, Sec. 10; Ben. Reg. VII., 1795, Sec. 7; Ceded and Conq. Prov. Reg. II., 1803, Sec. 7.

(d) R. S. C. 15th June, 1847, p. 104.

(e) See Reg. XIX., 1810, Sec. 15, Reg. III., 1793, Sec. 11, Sel. Rep. 29th November, 1834, v. 5, p. 363, Ibid, 22nd September, 1836, v. 6, p. 110, and 28th March, 1848, v. 7, p. 476.

(f) S. D. 1847, 29th June, p. 290.

(g) Sel. Rep. 18th August, 1806, v. 1, p. 154.

the land claimed, and for reversal of the decision of the Superintendent.(*h*)

Where Court may entertain suit to set aside its own decree.

If the decree of a Civil Court be collusively obtained by the parties to an action, for the purpose of defrauding a third person, he may sue in the same Court for the reversal of the decree.(*i*)

As to suit for mere declaration of right.

It is a question as yet undecided whether the Civil Courts have jurisdiction to entertain a suit which is brought, not for the enforcement of any civil rights, but for the bare declaration of a right to perform certain religious ceremonies; or indeed to decide any right merely in the abstract.(*j*)

(*h*) R. S. C. 26th December, 1848, p. 147.

(*i*) Sel. Rep. 7th September, 1847, vol. 7, p. 371.

(*j*) Namboory Setapaty, *v.* Kanoo Colanoo Pullia, Moo. Ind. Cas. v. 3, p. 359.

CHAPTER VII.

FOR WHAT THINGS SUIT MAY NOT BE BROUGHT ORIGINALLY.

THE Civil Courts have not jurisdiction to define the boundary between the British territories and the dominions of an independent Prince, and they will not assume such jurisdiction even upon consent of the parties. The Courts have no means of enforcing their judgment in such a case. It is for the two Governments mutually to adjust their boundaries.(*k*)

To fix boundary between British dominions and those of Independent Prince.

If indeed A. should sue B. for land, and B. should plead that the land lay beyond the British frontier, and within the dominions of another Government, the Court must incidentally decide this question, in order to enable it to do justice between A. and B., but that decision would not be binding upon any person besides the parties to the suit, nor could it affect any question between the two Governments as to their respective boundaries.

Where such question must be decided incidentally.

If an independent Rajah has estates within the limits of the British dominions, in the event of a disputed succession, the Courts must decide who is entitled to succeed to those estates; and if the estates go with the Raj they may have to determine, incidentally, who is the successor to the Raj, but such determination is not intended to be, and cannot be, an adjudication of the Raj itself to any person.

Where the succession to an independent Raj must be adjudicated upon.

The Government is not liable to be sued in respect of any error or irregularity, which may occur in any order, proceeding, or decree of a Court of Judicature, or of an Officer exercising judicial powers with which he may have been invested for

Government and its officers not liable for judicial acts or their execution.

(*k*) Sel. Rep. 19th September, 1848, v. 7, p. 541, Supra, p. 3.

the cognizance of any pleas, suits, complaints, or informations, even although a Revenue Officer or other Officer of Government may have been employed in giving effect to such order, proceeding, or decree; nor is any Officer liable for any thing done or suffered to be done in conformity with such order, proceeding, or decree.(*l*)

Government liable for administrative acts.

If any act be done pursuant to a special order originating with the Governor General in Council, or the Board of Revenue, by a Collector of the Revenue, a Salt Agent, a Collector of the Customs, or the Mint or Assay Master, or any of their Assistants or Native Officers; in such cases if a Native, or any other person, not being a British Subject, shall consider himself aggrieved, the Officer by whom the act may have been done is not liable to be sued for it, but the Government is to be considered as the defendant.(*m*)

Suits against Collector for judicial acts.

A Collector is not personally amenable to the Civil Courts for acts done by him in his judicial character under Regulation VIII., 1831.(*n*)

Nor can the Civil Courts take cognizance of suits against a Collector by a bidder at a public sale, who has been fined by that Officer.(*o*)

Suits against Magistrate for official acts.

Nor of suits against a Magistrate or a Joint Magistrate for official acts, whether legal or illegal, such as for instance his assumption, on the part of Government, of the management of ferries.(*p*)

Claims connected with resumption of ferries.

Claims in respect of such assumption or resumption are cognizable by the Governor General in Council, and not by the Civil Courts.(*q*)

For pensions.

Nor do the Civil Courts entertain claims upon the Government or its Officers for pensions, the original titles to which has not been previously recognized and confirmed by the

(*l*) Reg. XI., 1822, Sec. 38.

(*m*) Reg. III., 1793, Sec. 11.

(*n*) R. S. C. 15th June, 1847, p. 104.

(*o*) Con. 1201, Cal. C. 15th February, West C. 8th March, 1839. See also Con. 440, 8th December, 1826.

(*p*) Sel. Rep. 18th May, 1848, v. 7, p. 497.

(*q*) Ibid, and see Reg. XIX., 1816, and Reg. VI., 1819.

Revenue Authorities or by Government:(r) but when the pension has once been created the pensioner may sue for it.

For charges before settlement.

The Courts do not take cognizance of actions for the recovery of money allowances for worship or other purposes, granted as charges upon any estate previous to the decennial settlement.(s)

The reason of this last exception is as follows:

The amount of pensions or allowances, formerly recoverable from the proprietors or farmers of lands, was included, at the decennial settlement, in the revenue of Government; and by the 5th Section of Regulation XXIV., 1793, it was provided that all claims to such pensions or allowances should be preferred to the Collector. Their continuance, or discontinuance, rested with Government, under Sections 2 and 3 of that Regulation. Such claims as were recognized, were acknowledged in grants or sunnuds given by the Government according to Sections 11 and 12; and by Section 17, it was declared, that no claims of the sort were cognizable in any Court of Judicature.

Deeds.

Nor do the Courts entertain suits for the title deeds of property which is situated within the jurisdiction of the Supreme Court.(t)

Lunatic.

Nor for the protection of the estate of a lunatic which consists exclusively of personal property.(u)

For reversing revenue orders.

Nor for the reversal of an order for the confiscation of an estate, passed by the Revenue Authorities and confirmed by the Executive Government under the regulations in force before 1793.(v)

Annulling public sale.

But they have power to entertain a suit for annulling a public sale and recovering the purchase-money, on the ground of any evident and material error in the description of the lands advertised to be sold, and specified in the bill of sale delivered to the purchaser. In such case, however, the party complain-

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(r) Con. 230, 12th January, 1816.

(s) Reg. XXIV., 1793, Sec. 17, R. S. C. 7th March, 1848, p. 133.

(t) Sel. Rep. 29th December, 1843, v. 7, p. 144.

(u) Con. 1311, West. C. 15th October, Cal. C. 5th November, 1841.

(v) Sel. Rep. 6th May, 1817, v. 2, p. 235.

ant must have previously sought redress from the Board of Revenue and the Governor General in Council.(*w*)

The Civil Courts have no power to entertain a suit for altering the public assessment of lands.(*x*)

The decision of the Government respecting the assessment and apportionment of revenue, on the occasion of a partition of a joint estate, is final, subject only in cases of fraud or error to revision by the same authority within ten years. The Courts of Judicature have no power to set aside the decision of the Government on a question of this nature.(*y*)

Jurisdiction of the Civil Courts in matters connected with Resumption.

Where the Special Commissioner for resumption, appointed under Regulation III., 1828, has decreed certain land to be liable to resumption, the Civil Court cannot entertain an action, the real object of which is to set aside such decree; such as a suit against Government simply to recover possession of the land resumed, even though no express reference be made in the plaint to the order for resumption.(*z*)

It is the province of the Resumption Courts, to determine whether the land be liable to be assessed by the Government. Any decision against the claim of the Government, must proceed upon the ground, that the property forms part of a settled estate. Whether it belongs to the settled estate of A. or to the settled estate of B., is often a question upon which Resumption Court must pronounce an opinion, but it can seldom be more than a secondary and incidental question. And when the Court has decided, between the Government, claiming to assess, and an individual claiming the right to hold the land free from assessment, that the land is free, the decision is conclusive upon the point, that the land is to be held free, but it does not prevent another individual from asserting in the Civil Court a proprietary right to the land, as against

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(*w*) Sel. Rep. 18th August 1806, v. 1, p. 155.

(*x*) S. D. A. Sel. Rep. 17th June, 1817, v. 2, p. 242; see p. 26, Supra; and Reg. VII., 1822; Reg. IX., 1833, Con. 1128, 5th February 1838.

(*y*) S. D. 1848, 15th May, p. 451, Reg. XI., 1811.

(*z*) Sel. Rep. 4th March, 1846, v. 7, p. 256.

the person who has successfully contested its liability to assessment; for it was not the private proprietary right that was brought into discussion before; and any person who appeared *primâ facie* to be the proprietor might contest the claims of the Government.(*a*)

Even if both claimants came before the Resumption Court, and the Resumption Court has decided against the Government because it considered the land to belong to the settled estate of A. and not to the settled estate of B., and so has necessarily, yet incidentally, and for the purposes of its own duty only, pronounced its opinion in favor of A. and against B., yet B. may sue A. for the lands, for it was not the province of the Resumption Court to decide any questions as between them, and its decree will equally stand good, so far as the resumption is concerned, whether the lands belonged to the estate of A. or to the estate of B.(*b*)

But it may happen that an adjudication upon the rights of private individuals is an essential preliminary to the decision of the question of assessment, and forms the very basis of the proceedings of the Resumption Court. In such cases the proprietary right cannot afterwards be contested in the Civil Courts.

Where a decree was passed by the Resumption Court for the resumption of a mehal, which, whatever might be its limits, unquestionably belonged to A., and in the course of proceedings in the same Court for defining the boundaries of the mehal, it was adjudged that certain lands lay within those boundaries and formed part of the mehal, the Civil Courts declined to entertain a suit against A., for the proprietary right to those lands,(*c*) grounded on the allegation that the lands did not form part of the resumed mehal. It is obvious that if the Civil Court were to decide in favour of the plaintiff in such a suit, it would declare that land not to be liable to resumption, which the Resumption Court had declared to be liable to resumption.

(*a*) Sel. Rep. 17th December, 1846, v. 7, p. 284.
(*b*) Sel. Rep. 31st January, 1848, v. 7, p. 428.
(*c*) R. S. C. 17th July, 1847, p. 199.

The doctrines laid down upon this occasion were nearly as follows:

In the case of a suit to resume a lakhiraj tenure, the Resumption Court decides whether the tenure be valid or invalid, but the Civil Court may still decide whether the land, whatever be its tenure, belongs to A. or to B.

If the Resumption Court has declared a certain *chur*, or piece of newly formed alluvial land, to be liable to assessment, but has not specified the estate to which it is attached, the Civil Court may entertain an action between parties contending for the proprietary right, and willing to take the lands at the assessment fixed by Government.

But there are other cases in which the questions of assessment and proprietary right are so much mixed up together, that it is impossible to separate them. In such cases, the Resumption Court, if it declares the land liable to assessment, does in fact decide the question of proprietary right, and the Civil Court, if it decides upon the proprietary right, does in substance decide the question of assessment also.

It may happen that two estates were originally surveyed and measured, and assessed with reference to that measurement: their boundary being formed by a stream running between them. After a lapse of years, the Resumption Officers obtaining intelligence of a considerable accretion to one of the estates, proceed to make the usual inquiries. A., the proprietor on one side of the stream, claims the lands under Clause 2, Section 4, Regulation XI., 1825, as a portion of his estate, separated from it by a change in the course of the stream. B., the proprietor on the other side, claims it under Clause 1 of the same Section, as an increment to his estate. In order to ascertain this point, reference is made to the extent of lands comprised in each estate at the period of the original assessment.

A., the proprietor who claims the land as a portion of his original estate, is found to possess as much land as he did at the time of the assessment. The Resumption Officers declare the land liable to assessment as an increment to the estate of

B., the proprietor on the opposite side of the stream. This is essentially a determination of the proprietary right.

Again, in the case already mentioned, where a lakhiraj tenure is resumed, but disputes occur as to the extent of lands comprised within it, and a specific portion of land is claimed by two parties, one the proprietor of the resumed tenure, the other the proprietor of a neighbouring assessed estate:—when the Resumption Officers decide, whether the contested lands are, or are not liable to assessment, they in fact decide the question of proprietary right; that is to say, there is a judicial question to be decided as an essential preliminary to the question of assessment. As the Regulations enacted for the guidance of the Resumption Officers invest them with full power to take all measures necessary for the determination of the liability or non-liability to assessment, such judicial questions may with propriety be decided by the Resumption Court, and after being so decided, they are not cognizable by the ordinary Courts of justice, which cannot interfere directly or indirectly with the Government revenue.(*d*)

Even if there has been a violation of the orders of Government, as where, in contravention of the order of the 8th August 1839, a man has been disturbed in his possession, without having had an opportunity given to him to state his objections to the proceedings of the Resumption Court; the irregularity of the proceedings of that Court will not invest the Courts of justice with a jurisdiction which they do not otherwise possess, and the person desiring redress must apply to the Resumption Court itself.

Where the Government has resumed rent-free lands, and has subsequently as a matter of favour and not of right, waived its title to receive revenue from those lands, no action can be maintained against the Government, for revenue received by it while the resumption was in force.(*e*)

(*d*) Sel. Rep. 4th March, 1846, v. 7, p. 256, S. D. A. 1846, p. 413.

(*e*) Sel. Rep. 6th May, 1844, v. 7, p. 159.

To impeach document used before Collector.

The Civil Court is not competent to entertain an action merely to prove that a document filed in the Collector's office was a forgery. In such a case the revenue authorities ought to be applied to.(*f*)

Criminal matters.

The Civil Courts are prohibited from interfering in any matter of a criminal nature which is cognizable by the ordinary criminal tribunals, except in the case of contempt or perjury committed in open Court.(*g*)

They cannot interfere to stay proceedings in the Criminal Court in the prosecution of a case of forgery at the instance of the Collector.(*h*)

They cannot take cognizance of suits for the recovery of costs incurred in criminal cases.(*i*)

Nor of suits to contest or to stay the execution of the awards of the criminal authorities under Section 6, Regulation VII., 1819.(*j*)

Costs in Supreme Court.

A man who has realized part of his claim by an action in the Supreme Court and obtains judgment in the Civil Court for the residue, cannot recover before the latter tribunal the costs which he has incurred in the Supreme Court.(*k*)

This was decided in a case where the suit in the Civil Court was founded on the original debt. But if a man sues on the judgment of the Supreme Court, founding his suit upon that judgment, he must recover the sum awarded him by the judgment, whether principal or costs.

Voluntary payments.

The right to receive payments, which are in their own nature voluntary, arising wholly out of personal preference, cannot be made a subject of suit in the Civil Courts, and for this reason the Courts cannot take cognizance of claims for the perquisites

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(*f*) S. D. 1847, 21st August, p. 455.

(*g*) Reg. III., 1793, Sec. 18, Benares Reg. VII., 1795, Sec. 11, Ced. and Conq. Prov. Reg. II., 1803, Sec. 11.

(*h*) R. S. C. 19th November, 1846, p. 87.

(*i*) Con. 367, 2nd July, 1824. Sel. Rep. 2nd July, 1841, v. 7, p. 40.

(*j*) Cir. Ord. Cal. C. 31st August, West C. 13th November, 1838, Con. 1158, West C. 22nd June, Cal. C. 13th July, 1838.

(*k*) Sel. Rep. 16th January, 1821, v. 3, p. 66.

of the office of Chowdhree.(*l*) But it seems that they will entertain a suit, for compelling one man to employ another as his priest, or porohit, according to the hereditary custom of the families.(*m*)

Things against morality or public policy.

A suit may not be brought for any thing repugnant to positive law, to morality or to public policy, as for the division of gains unlawfully acquired; or to enforce the performance of an engagement which it would be fraudulent or immoral to fulfil, such as a conspiracy to cheat a third party, or an agreement to defeat his rights, or to evade the rightful process of law,(*n*) or an agreement to compromise a prosecution, where the thief promises to restore the value of the thing taken, and the person who has been robbed, undertakes not to prosecute the thief.(*o*)

Compounding a prosecution.

But where one man has entrusted property to another and the latter has failed to restore it, but has agreed to pay him the value of it, an action may be maintained upon such engagement, even though the depositor may have subsequently taken criminal proceedings against the other in respect of the transaction.(*p*)

Champerty.

The Courts will not give effect to an agreement in the nature of champerty, that is to say, a contract between a claimant of property and a stranger, to the effect that the latter shall supply money for carrying on the suit, and that the former shall give him a share of the property when recovered.(*q*)

But a party may sell and transfer his claim, either before or after decree—and the purchaser will be admitted to stand in the place of the seller.(*r*)

(*l*) Sel. Rep. 28th November, 1846, v. 7, p. 282.

(*m*) S. D. 1848, 15th June, p. 532, See S. D. 1849, 8th November, p. 428.

(*n*) Sel. Rep. 5th August, 1814, v. 2, p. 118. Ibid, 24th March, 1846, v. 7, p. 257. S. D. 1849, 9th July, p. 276.

(*o*) Con. 318, 7th July, 1820. See the last Section of Reg. XII., 1818.

(*p*) S. D. 1848, 17th February, p. 94, Ibid, 1849, 6th November, p. 423. Supra, p. 26.

(*q*) Sel. Rep. 19th January, 1825, v. 4, p. 12. Ibid, 29th September, 1836, v. 6, p. 131, 15th August, 1840, v. 6, p. 298. S. D. 11th August, 1847, p. 423, 9th August, 1849, p. 340. See also S. D. 16th December, 1848, p. 874.

(*r*) Sel. Rep. 24th November, 1847, v. 7, p. 413.

Things considered repugnant to the policy of the regulations.

It would seem that a suit cannot succeed in the Civil Courts if its object be considered repugnant to the policy of the regulations, though not expressly forbidden by any of them.(s)

Thus, with respect to mortgage securities affecting land:—

There are three species of mortgage of land, known to the regulations, and to the practice of the Civil Courts.

The first is the simple mortgage, by which the borrower gives to the lender the enjoyment of the produce of the land, reserving to himself the right to redeem the land at any time on the debt being liquidated, either by the profits of the land or by a cash payment, or a deposit of money in cash.

The second is where the land is pledged as a collateral security for the debt, without enjoyment of the produce by the mortgagee, or any condition for the absolute transfer of the land to him in case of non-payment. In such cases the mortgagee, if he is not repaid, brings an action for the recovery of the loan; and having obtained a decree, proceeds through the Court, in execution of the decree,(t) against the property, upon which he has a lien.

The third security of this class, is the bye-bil-wuffa or kut-kubaleh, mortgage or conditional sale, in which, if the debt be not paid as stipulated, the mortgagee proceeds in Court according to prescribed rules, to convert the conditional into an absolute sale.

But it is held that the policy of the regulations has been less to facilitate the pledge of land, than to protect the borrowing landholder against the lender, as some compensation to the former for the stringency of the revenue regulations;—and that they do not sanction in any case the transfer of immovable property in satisfaction of a debt, without the intervention of public authority; unless such transfer be made by the direct and immediate act of the proprietor himself.

(s) Sel. Rep. v. 7, p. 370.
(t) Infra Chap. XXVIII.

For this reason, where an estate in the Mofussil had been sold by a mortgagee in satisfaction of the mortgage debt, by virtue of a power of sale contained in the instrument of mortgage (which was framed in a manner well known to the English law,) the Civil Court dismissed a suit brought by the purchaser against the mortgagor for possession of the land. (*u*)

It does not appear necessary, in a treatise upon mere Procedure, to discuss the doctrines involved in this decision, or to inquire whether the borrower can, in fact, be better protected against extortion, than by enabling him to give an effectual and marketable security, upon which the lender may advance his money with confidence.

(*u*) Sel. Rep. 24th July, 1847, v. 7, p. 362. See S. D. 12th September, 1849, p. 392. Ibid, pp. 364, 385.

CHAPTER VIII.

FOR WHAT THINGS SUIT MAY NOT BE BROUGHT FOR SECONDARY REASONS.

A MATTER may be in its own nature properly cognizable by a Civil Court, and yet the Court may be precluded by some extraneous circumstance from entertaining a suit regarding it.

Secondary reasons which bar suit.

The claim may, for instance, have been already adjudicated upon, or it may be pending in another Court.

SECTION I.

CAUSE PREVIOUSLY HEARD AND DETERMINED.

Claim already adjudicated upon.

A CIVIL Court cannot entertain(*v*) any cause which from the production of a former decree, or of the records of the Court, shall appear to have been heard and determined by any former Judge, or by any superintendent of a Court having competent jurisdiction; or even one, which under the rules against the splitting of claims, ought to have been included in a previous suit.(*w*)

If the former proceedings were had in the miscellaneous department, they will not bar inquiry in a regular suit.(*x*)

(*v*) Reg. III., 1793, Secs. 12, 16, Benares; Reg. VII., 1795, Ced. and Conq. Prov.; Reg. II., 1803; Con. 999, West. C. 5th February, 1836; Sel. Rep. 21st August, 1810, v. 1, p. 307; S. D. 1849, 2nd August, 1848, p. 320, 17th June, p. 535; Sel. Rep. 25th April, 1826, v. 4, p. 146; 17th April, 1826, v. 4, p. 137; 9th February, 1820, v. 3, p. 12.

(*w*) Cir. Ord. 30th September, 1847. Infra, ch. x.

(*x*) S. D. 1849, 5th December, p. 432.

Where any doubt arises respecting the competency of the former jurisdiction, the Judge reports the circumstances to the Sudder Dewanny Adawlut, and acts as instructed by that Court.

How the rule is to be construed.

The rule must not be too widely construed, as every cause is entitled to be heard once, and if the Courts refuse to entertain a suit which has not really been heard before, great injustice is committed.

Where a cause may be considered to have been heard before.

A cause may fairly be considered to have been heard and determined before, if the subject matter of the former suit was the same; the parties, or at least the parties really and effectively interested,(y) the same; the issue the same; if the proceedings were taken for the same purpose; the jurisdiction competent; and if the claim, which is sought to be enforced, has been directly adjudicated upon in a former suit by a decree or order, declaring or recognizing a right, or negativing it by the dismissal of a plaint.

If the same matter which is brought forward in the second suit, was alleged and put in issue in the first suit, and if the first suit was dismissed as to that matter, merely because the issue was improperly raised and did not affect the real question in dispute between the parties; then such matter may be brought forward in a second suit.

Former decree must have been final.

A decree or order of dismissal is a bar only where the Court has thereby determined, that the plaintiff had no title to the relief sought by his plaint, and only so far as such decree was in its nature final: it is, for instance, no bar if it dismissed the suit, because the plaintiff was a minor under the guardianship of the Court of Wards, and the suit was not brought under the authority of that Court; or if it was pronounced in a suit instituted on behalf of a minor by one not authorized to act for him; or if it was merely a decree of restitution after forcible dispossession, pronounced under Section 3,

(y) S. D. 1848, 18th March, p. 210. Ibid, 1849, 20th June, p. 213. 18th December, p. 461. Sel. Rep. 7th February, 1817, v. 2, p. 223.

Regulation XLIX., 1793, and not adjudicating upon the question of property.(z)

The fact that the plaintiff has alleged in the former suit, matters which were not and could not be the subject of the decree, cannot interfere with the founding a new suit upon such matters after the decree.

The question really is, whether the matter now brought forward has been disposed of by the decree in the former suit: not whether it formed the subject of statements to which the former decree did not apply.

In a suit(a) to ascertain the boundaries between village A. and village B., a map was prepared and was adopted by the decree, which embraced not only the boundaries between village A. and village B., but likewise those between village A. and village C., which were not then in dispute. A suit having been subsequently brought to ascertain the boundaries between village A. and village C., it was decided (although the parties to both suits were the same) that the former decree was binding only as to the immediate point at issue in the former suit, and that as the laying down any boundaries between A. and C. was purely superfluous, it did not preclude a full investigation in the second suit.

One claim not to be litigated twice under a colorable variation.

The subject matter of the former suit is considered to have been the same, if it was the same in substance, although in the new suit there may be some difference in amount, or some other merely colorable variation.

Where a man, alleging himself to be heir of a person deceased, claims a share of the property of that person, and his suit is dismissed on the ground that the right of inheritance is in the defendants and not in him, he cannot litigate the same matter again by demanding a larger amount, and suing individuals whom he did not sue before, but who stand upon the title which has been decided to be preferable to his.(b)

(z) Sel. Rep. 4th March, 1813, v. 2, p. 49. Ibid, p. 14.

(a) S. D. 1848, 11th March, p. 184.

(b) Sel. Rep. 13th April, 1824, v. 2, p. 335.

On what points a former sentence is conclusive.

A matter which has been directly determined by a competent Court, cannot be gainsaid; the sentence is conclusive: but this is to be understood only of the matter directly tried and decided, and not of matters which are only to be inferred from the sentence.

Points directly decided.

Thus(c) where A. has died under such circumstances that, if he left no son, his brother would be his heir, and the succession to his estate is contested between a person claiming to be his son, and a person who is undoubtedly his only brother, and the Court decides that the claimant is not his son, and adjudges the inheritance to his brother, its sentence is conclusive against the alleged son.

Matters merely inferential.

But where the brother, alleging that A. was childless, claims and obtains the inheritance in a suit against a stranger, and afterwards a person claiming to be A.'s son institutes a suit against the brother, the former sentence is no bar to this claim: although it may well be inferred from that sentence, that the Court was satisfied that A. had left no son. For the son had no opportunity of advancing his claim in that suit.

And if in a suit between mortgager and mortgagee, the latter obtain a decree for foreclosure, and for the possession of the land; this only places him in the position which the mortgager occupied, and is no bar to any suit by a person claiming by a title preferable to that which the mortgager possessed when he executed the mortgage.(d)

Where parties to, and objects of the former proceedings were different.

Here it will be observed that the parties to the former suit and the object of the former proceedings were different.

To borrow an illustration from the criminal law, where it has been determined in a civil suit that certain documents are genuine and not forged; this is no bar to the institution of a prosecution against one of the parties, for the forgery of those very documents; since the Government, as representing public justice, was not a party to the former suit, and had no opportunity of litigating the question.

(c) Sel. Rep. 5th November, 1811, v. 1, p. 355.

(d) Sel. Rep. 12th February, 1848, v. 7, p. 439.

And so although a man may have been acquitted by a Criminal Court, of the charge of having forged certain documents, yet this is no bar to the institution of a suit against him in the Civil Court, founded on the allegation that those documents are forgeries; and where a man has been fined by the magistrate for preferring a false criminal charge, if he be sued in the Civil Court for damages sustained in consequence of that false charge, he may adduce evidence to shew, that he was justified in making the charge, and that the magistrate was wrong in fining him; and the Civil Court is not bound to follow the opinion of the magistrate.(*e*)

Resort to a regular suit is allowed for the purpose of more thorough and sifting investigation than can be had on a summary process. A summary order is therefore no bar to regular suit for the same matter. Thus a summary order for the sale of land in execution of a decree, though such order be made in disallowance of an application to prevent the sale, does not prevent the applicant from instituting a regular suit to cancel the sale.(*f*)

Where cause of action is different.

The subject matter and the persons sued may be same in the second suit as in the first, if the cause of action is different.(*g*)

Parties need not be precisely the same.

The rule which forbids men to sue again upon a claim already disposed of, may apply, if the former suit was virtually between the same parties as the latter, although they may not have been precisely the same.

Persons claiming under the original litigant.

The prohibition universally applies as well to persons claiming under the original litigants, as to the original litigants themselves. That which has been decided as between the parties to a suit, stands good as between their descendants and representatives;(*h*) that is to say, if the decision be a final decision. If it affects the property of the person decided against, and if there is a right of appeal, that right will survive to those

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(*e*) Sel. Rep. 8th June, 1848, v. 7, p. 508.

(*f*) S. D. 1849, 20th February, p. 58.

(*g*) S. D. 1846, 16th May, p. 185. See Ibid, p. 275, S. D. 1849, 7th March, p. 52, 29th March, p. 85.

(*h*) Sel. Rep. 30th November, 1841, v. 7, pp. 54 and 57.

upon whom the property of the deceased may devolve. When the period of appeal has been allowed by the representatives to pass away, the decree is considered final as against them.

If a former decree, made in a suit between A. and B., has awarded to A. the possession of land, or has recognized his possession of it,—in one capacity (such as that of Mokurrereedar,)—this award or recognition of possession will not operate as any bar to a subsequent suit between the same parties, where a different interest in the same property is the subject matter of suit.(*i*)

A decision pronounced in a suit between A. and B. for a particular estate, does not prevent the institution of a suit between them for another estate, although the points of law and fact, upon which the title depends, are the same in each case.(*j*)

Parties must have been fairly arrayed in former suit.

In order to bar the second suit, it is not enough that in the former suit the same persons were before the Court as parties: but the suit must have been so constituted that they had an opportunity of asserting their rights; for a person may be made a party to a suit, in such a way as to prevent him from effectually bringing his claims into discussion.

A., a childless widow, sued her husband's family for the possession of his share in the patrimonial estate, and she included, among the defendants, another childless widow, B., belonging to the family, and who was likewise entitled to sue for her own husband's share in the estate. The defendants, with the exception of B., alleged in reply the existence of a family custom excluding childless widows from the inheritance, and upon this ground the suit was dismissed. Here B. who was a defendant, was only called upon to answer the plaint, and the law confining her to the subject matter of the plaint,(*k*) prevented her from replying to the answer of her co-defendants, which attacked her rights; nor was she even permitted to appeal against the

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(*i*) S. D. 1849, 18th December, p. 461. Sel. Rep. 19th June, 1832, v. 5, p. 216.

(*j*) S. D. 29th March, 1849, p. 85.

(*k*) Infra, Chap. XVIII.

decision, as it did not directly take from her any thing which she possessed. She was therefore a party to the suit, but in such a way as to prevent her from setting forth the merits of her case.

It was therefore held that this decree constituted no bar to the assertion of a similar claim in a new suit, by the second childless widow, B., for the former contest was not between the same parties who were before the Court in the second suit.

The first decree was considered to afford some evidence against her claim in the second suit, but the Court was not thereby precluded from entering freely into an examination of the evidence in her favour.(*l*)

Causes decided by the Supreme Court.

The prohibition applies to causes which have been determined by the Supreme Court, equally with those which have been decided in the Courts of the East India Company.(*m*)

Merits of former decrees not to be discussed.

The Civil Courts cannot examine the merits of any such former decree, either with reference to the law, or to the facts of the case,(*n*) nor the propriety or regularity of the execution of the decree :(*o*) but they will assume all the proceedings to have been right, and will give effect to claims founded upon them.

Effect of Sheriff's sale.

If (*p*) the right, title, and interest of A. in any property be sold to B. by the Sheriff of Calcutta, in pursuance of a decree of the Supreme Court, the Civil Courts will consider the sale as having transferred the interest of A. absolutely to B. and will decree possession to B., if A. resists his claim, and drives B. to institute a suit: and, as against third parties, they will regard B. as standing in the place of A., and will give him such aid as they would have given to A. himself, but no other.

Private sale of property while under at-

A zemindar having privately sold a dependant talook, (*i. e.* having in exercise of his general right as zemindar, created

(*l*) S. D. 1847, 9th June, p. 205, infra, Chapters XXI. and XXII.

(*m*) Sel. Rep. 18th January, 1844, v. 7, p. 150.

(*n*) Sel. Rep. 25th April, 1826, v. 4, p. 146, 17th April, 1826. Ibid, p. 137.

(*o*) Sel. Rep. 23rd September, 1837, vol. 6, p. 187; Sel. Rep. 15th January 1842, v. 7, p. 70; S. D. 3rd June 1846, p. 211.

(*p*) See the cases last cited.

a lesser and derivative estate in the land,) while his zemindary was under an attachment by the Supreme Court, which ended in the public sale of it by authority of that Court, the private sale was held to be invalid as against the purchaser at the public sale, though binding on the zemindar or his successor, in the event of the public sale being set aside as erroneous by the Supreme Court itself.(*q*)

tach ment by Supreme Court.

If a mortgage be foreclosed in the Supreme Court, and if the mortgagee be obliged to sue in the Civil Courts to obtain possession, they will consider the order as perfectly valid and operative to the extent to which it professes to go; that is to say, they will hold that it transferred to the plaintiff all the interest which the defendant had in the land at the date of the order.(*r*)

Effect of foreclosure in Supreme Court.

In a case (*s*) in which this principle was acted upon, the foreclosure of the mortgage was contrary to Regulation XVII., 1806, but the mortgager had voluntarily subjected himself to the jurisdiction of the Supreme Court, and he was therefore considered to have waived his right to rely upon that regulation.

Effect of submission to jurisdiction.

The previous decree remains unquestioned, to whatever limits it may extend, whether it be absolutely final in its nature, or be only one of the orders passed during the progress of a cause, such as an order to pay money into Court; which precludes any other Court from entertaining a suit for the same money while it remains in the first Court.(*t*)

Previous decree unquestioned so far as it extends.

(*q*) Sel. Rep. 22nd December 1806, v. 1, p. 172; Ibid, 3rd July 1807, v. 1, p. 195. See Sel. Rep. 3rd October 1806, v. 1, p. 167, not very clearly reported. The Court was entitled to be satisfied—as a matter of fact—that the estate was under such attachment that any alienation of the estate would have been regarded by the Supreme Court as an interference with its process. See S. D. 1849, 10th September, p. 385, and Chap. XXVIII., infra.

(*r*) Supra, p. 39. See Sel. Rep. 24th July, 1847, v. 7, p. 362; S. D. 1849, pp. 364, 385, 392.

(*s*) Sel. Rep. 19th September, 1821, v. 3, pp. 111, 112.

(*t*) Sel. Rep. 18th January, 1844, v. 7, p. 150. See p. 41, Supra.

Nor will a Civil Court interpret the meaning or interfere with the execution of any decree of any other Civil Court or of the Supreme Court.(*u*)

Execution of previous decree not to be interfered with.

Nor can it set aside summary orders passed in execution of the decree of another Court having jurisdiction, whether such order regard mesne profits, interest, or any other matter in dispute between the parties in the original suit. Such orders constitute no new cause of action, and if they are erroneous, application ought to be made to the Court by which they were issued.(*v*)

Where a claim has been partly enforced elsewhere, the rest may be sued for.

Where part of a debt has been realized by means of an action in the Supreme Court, and the action in that Court has been discontinued, the claimant may sue for the remainder of his debt in the Civil Courts.(*w*)

And a previous action in the Supreme Court on a joint obligation against one of several contractors, such one being alone subject to the jurisdiction of that Court, does not bar an action in the Civil Court against him and his co-contractors for so much as remains unrealized.(*x*)

So where the guardians and the agent of an infant zemindar borrowed money to pay his arrears of revenue, and gave a bond for the amount in their own names, upon which a decree was obtained against them in the Supreme Court and one of them was taken in execution, the lenders were permitted to recover the debt from the zemindar by suit in the Civil Court after he attained his full age.(*y*)

Interference to prevent abuse of former decree.

But if from any circumstance, such as fraud, surprise, or mistake, a former judgment is being perverted into an engine of oppression, then the Court will interfere, not with the judgment itself, but with the party who is attempting to abuse it.

(*u*) Sel. Rep. 26th September, 1844, v. 7, p. 183.

(*v*) Con. 1129, Cal. and West C. 9th February, 1838; Sel. Rep. 12th November, 1840, v. 6, p. 303.

(*w*) Sel. Rep. 16th January, 1821, v. 3, p. 66, Supra, p. 36.

(*x*) Sel. Rep. 8th April, 1841, v. 7, p. 25.

(*y*) Gopeemohun Takoor and others, *versus* Rajah Radhanath; Knapp's Privy Council Cases, v. 2, p. 228.

If an unfair use has been made of a decree or of the legitimate process of the Supreme Court, or of any other tribunal, redress for this injury may be sued for in the Civil Court, but the decree or process must not be impugned in such suit.

Thus where a man consents that judgment shall be entered up against him in the Supreme Court, under certain private stipulations, as to the use which is to be made of such judgment: if the transaction is itself a fair and honest one, (but not otherwise) a breach of the stipulations affords a legitimate cause of suit.(*z*)

And in this sense it has been said, that, although the Civil Courts cannot directly question a judgment in the Supreme Court, yet they can, upon collateral grounds, not brought forward there, control the parties who have obtained such judgment, when those parties are subject to their own jurisdiction.

SECTION II.

WHERE SUIT IS PENDING ELSEWHERE FOR SAME CAUSE OF ACTION.

Where suit pending elsewhere.

If a suit shall have been instituted in any Civil Court in which it is cognizable, no other Civil Court is competent to entertain a suit for the same cause of action.

If a person commences a suit for the same cause of action while the former suit is depending, or after a decree has been passed in it, the Judge is not only to dismiss the suit with such costs as he may deem it equitable to award against the plaintiff, but is to fine him in such amount as he may think proper upon a consideration of the nature of the case, and the situation and circumstances in life of the offender, and is to commit him to close custody until he pays the fine.(*a*)

Second suit barred though not for whole matter of first.

The prohibition may be applicable although the second suit is not brought for the whole matter embraced by the first.

(*z*) See Sel. Rep. 5th August, 1814, v. 2, p. 118.

(*a*) Reg. III., 1793, Sec. 12. Benares Reg. VII., 1795, Sec. 7; Ced. and Conq. Prov. Reg. II., 1803, S. 9.

If a man institutes a suit for certain property, and afterwards sells part of the property, and the purchaser, whilst the suit is still depending, institutes a new suit for the part purchased by him:—then, if the whole object of the second suit be attainable in the first, the objection applies.

Where whole object of second suit cannot be obtained by first.

If, however, the whole object of the second suit is not attainable in the first suit, and is not attainable by any proceeding in the Court in which the first suit is pending, then the objection seems not to apply.

Suit pending in Supreme Court.

This regulation has been held to bar a suit brought for a cause of action regarding which a suit is already pending in the Supreme Court;(*b*) but, although this decision is in accordance with the spirit of the regulation, it is conceived that the Civil Courts have no authority in such a case to fine the litigious party.

Effect of submission to jurisdiction of SupremeCourt.

If a man enters into a covenant to be bound by the decision of the Supreme Court, in a particular matter, the submission only gives that Court a concurrent jurisdiction with the Civil Court, and does not bar the jurisdiction of the latter, if one of the parties chooses to institute a suit there, before suit has been instituted in the Supreme Court regarding the matter in question.(*c*)

Proceedings stopped by Insolvent Act.

Under the Act for the relief of Insolvent Debtors, XI. Victoria, Chapter 21, a suit cannot be prosecuted in the Civil Court for any claim against a party applying for the benefit of that Act, if in the Schedule required of him he shall have inserted such claim either as admitted, or as being disputed in respect of the amount only. But if it be entered simply as disputed, without any admission of right, the suit is not stopped.(*d*)

Where one man sues another for lands which he asserts to be rent-free, and it appears that another suit for the same lands is pending before the Collector, the plaint is dismissed forthwith.(*e*)

(*b*) Sel. Rep. 31st March, 1842, v. 7, p. 79; See also Cir. Ord. 30th September, 1847.

(*c*) Sel. Rep. 5th March, 1838, v. 5, p. 271; Sel. Rep. 24th July, 1847, v. 7, p. 362.

(*d*) Sec. 49. See S. D. 1849, 5th March, p. 50.

(*e*) S. D. 1847, 16th June, p. 261.

CHAPTER IX.

CLAIMS BARRED BY THE LAW OF LIMITATION.

EVEN where a wrong cognizable by the Civil Courts has been committed, and where no legal proceedings have been had in respect of it, it is necessary for the party injured to consider, before he institutes his suit, how long the right of action has existed, as there has been established, with regard to almost all legal remedies, a certain period of limitation, after which they are barred by the mere lapse of time.

The principle of limitation.

Those who have not thought it worth while to assert their own claims with activity and zeal, have the less title to require the aid of the state in enforcing them; and it is extremely hard to dispossess parties who have long been in quiet enjoyment of property, unconscious of any defect of title, and with habits and plans of life influenced by the income which the property produces. There is also, after a great lapse of time, the utmost difficulty in ascertaining the truth of facts, and in confuting fraud and perjury. Documents are lost or destroyed; it is not probable that all which relate to the title will be found safe, and those which are lost might have explained or perhaps done away entirely with the effect of those which remain. The witnesses necessary to make the account of the transaction complete, grow old or die: should they be alive, it may be difficult to find them, and their memories cannot be relied on as to very remote transactions.(*f*)

The Hindu and Mahomedan systems of law, like most other codes, have each their own periods of limitation intended for the peace of the country and for the prevention of fraud.

(*f*) See 2 Knapp P. C. C. 227.

Those periods, however, (which are not in themselves free from doubt,) are superseded in the Civil Courts, by the laws which have been enacted by the British Government of India for the guidance of those tribunals.(*g*)

It is proposed in the first place to state the general purport of the existing enactments upon this subject, and afterwards to consider in detail their practical application.

SECTION I.

THE ENACTMENTS.

The 12 years' rule.

THE Courts are prohibited from hearing, trying or determining (except in the cases to be mentioned below) the merits of any suit whatever against any person or persons, if the cause of action shall have arisen twelve years before any suit shall have been commenced on account of it.(*h*)

First exception to 12 years' rule.

The first exception to the twelve years' rule of limitation is where the complainant can shew by clear and positive proof that he had, within twelve years before the commencement of the present suit, demanded the money or matter in question, and that the defendant had admitted the truth of the demand, or promised to pay the money.

Second exception.

The second exception to the twelve years' rule of limitation is where the complainant can shew that he directly preferred his claim within that period, for the matters in dispute, to a Court of competent jurisdiction to try the demand, in which case he must assign satisfactory reasons to the Court for not having proceeded in such former suit.

Third exception.

The third exception to the twelve years' limitation is where the complainant can prove that from minority or other good and sufficient cause, he had been precluded from obtaining redress.

(*g*) Macnaghten's Mahomedan Law, p. 286, S. D. 1845, p. 70, Reg. II., 1805.
(*h*) Reg. III., 1793, Sec. 14.

The twelve years' rule of limitation is applicable to all the territories subject to the British Government of India.

To what territories the 12 years' rule applies.

It does not, however, apply to every description of suit.

Certain classes of rights may be asserted at any time within sixty years, and others without any limitation as to time.

The sixty years' rule of limitation is applicable to all the British dominions in India, with the exception of certain territories which have come into our possession less than sixty years before the present time.

To what territories the 60 years' rule applies.

In territories of the latter class, the Courts are forbidden, by a series of special regulations, to entertain any suit whatever, if the cause of action shall have arisen before the day fixed for each territory by the several regulations.(*i*)

This utmost period, in the provinces ceded to the British Government by the Nawaub Vizier, dates from the 10th November 1801.(*j*)

In the provinces constituting the zillah of Allyghur, the northern and southern divisions of the zillah of Seharunpore, and the zillah of Agra, from the 30th December 1803.(*k*)

In the territory constituting the zillah of Bundelkund, from the 16th December 1803.(*l*)

In the zillah of Cuttack, from the 14th October 1803.(*m*)

In the Pergunnahs of Sonk, Sonsa, and Sahar, (in the zillah of Agra) from the 17th April 1805.(*n*)

In Callinger, from the 19th of June 1812.(*o*)

In the Deyra Dhoon, from the 15th May 1815.(*p*)

In Khundeh and Mahobah, from 1st November 1817.(*q*)

In Pergunnah Goberdhun, from the 25th January 1826.(*r*)

And where the sixty years' limitation is hereafter spoken of, it is to be understood that it is subject to these exceptions.

(*i*) Con. 478, 18th April, 1828.

(*j*) Reg. II., 1803, Sec. 8, Cl. 1.

(*k*) Reg. VIII., 1805, Sec. 6, Cl. 2.

(*l*) Ibid.

(*m*) Reg. XIV., 1805, Sec. 5, Reg. XI., 1816, Sec. 4. S. D. A. Sel. Rep. 22nd March, 1805, v. 4, p. 39.

(*n*) Reg. XII., 1806, Sec. 4.

(*o*) Reg. XXII., 1812, Sec. 4.

(*p*) Reg. IV., 1817, Sec. 3.

(*q*) Reg. II., 1818, Sec. 3, Cl. 2.

(*r*) Reg. V., 1826, Sec. 3.

The limitation (*s*) of twelve years for the commencement of civil suits, is not applicable to any suits for the recovery of revenue, or for any public right or claim whatever, which may be instituted by or in behalf of Government, with the sanction of the Governor General in Council, or by direction of any public Officer or Officers, who may be duly authorized to prosecute the same on the part of Government.(*t*)

Sixty years allowed for claims of Government.

All claims(*u*) on the part of Government, whether for the assessment of land held exempt from the public revenue without legal and sufficient title to such exemption, or for the recovery of arrears of the public assessment, or for any other public right whatever, (the judicial cognizance of which may not have been otherwise limited by some special rule or provision in force) are to be heard, tried and determined in the Courts of civil justice, if the same be regularly and duly preferred at any time within the period of sixty years from the origin of the cause of action.

In what cases allowed for private claims.

Where possession acquired by fraud or violence.

Or has not been honestly held for twelve years.

The limitation of twelve years(*v*) is not applicable to any private claim of right to lands, houses or other permanent immovable property, if the person or persons who are in possession of such property when the claim of right may be preferred, shall have acquired such possession by violence or fraud, or by any other unjust, dishonest means whatsoever; or if such property shall have been unjustly acquired by any person from whom the actual occupant may have derived his title; unless it shall have been subsequently held for twelve years next before the institution of the suit, under a just and honest title, such as inheritance, purchase or any other fair title, which was believed by the holder to have conveyed to him a right of possession and property.(*w*)

But such violent, fraudulent, unjust or dishonest acquisition must be established to the satisfaction of the Court.

(*s*) Prescribed by Reg. III., 1793, Sec. 14; Reg. VII., 1795, Sec. 8; Reg. II., 1803, Sec. 18.

(*t*) Reg. II., 1805, Sec. 2, Cl. 1.

(*u*) Ibid. Cl. 2.

(*v*) Fixed by Sec. 14, Reg. III., 1793; Sec. 8, Reg. VII., 1795; Sec. 18, Reg. II., 1803.

(*w*) Reg. II., 1805, Sec. 3, Cl. 1.

Bad title cured by *bonâ fide* possession.

And, notwithstanding such unjust commencement of the title, yet(*x*) if the person, against whom the suit is brought, shall have obtained just and honest possession of the property by inheritance, or purchase, or fair donation, or by any other title which he believed to be just and valid, and which does not appear to have been contrived by him in collusion with any other person for the purpose of depriving the plaintiff of his right;—and if either such occupant himself, or any other person in his behalf, or from whom the property may have been obtained under any of the good titles aforesaid, or the whole in succession, shall have held quiet and unmolested possession under a title believed by them to be just and valid, during a period of twelve years before any claim thereto was preferred in a competent Court;—Then, private claims to property so circumstanced, are inadmissible after twelve years from the origin of the cause of action, unless they were cognizable under the exceptions and provisions in force before 1805.

No suit cognizable after 60 years.

No suit whatever is cognizable in any Court of justice, if the cause of action shall have arisen sixty years before the institution of such suit.

Nor is any plea on the part of the plaintiff for the non-prosecution of his claim of right, during a period of sixty years after the origin of his cause of action, nor any original defect of title on the part of the possessor of the property claimed after the lapse of such period, to be deemed a sufficient ground for taking judicial cognizance of any suit so preferred.(*y*)

Cases in which there is no period of limitation.

Mortgage. Deposit.

No length of time can establish a prescriptive right of property, or bar the cognizance of a suit for the recovery of property, in cases of mortgage or deposit of land or money, or any other property, movable or immovable, where the occupant has acquired or held possession thereof as mortgagee or depositary only, without any proprietary right.(*z*)

(*x*) Reg.II., 1805, Sec. 3, Cl. 3.

(*y*) Reg. II., 1805, Sec. 3, Cl. 3.

(*z*) Reg. II., 1805, Sec. 3, Cl. 4; Con. 965; West. C. 7th July, 1835.

Where possession has not been on the footing of ownership.

Nor in any other case whatever, wherein the possession of the actual occupant, or of those from whom his occupancy may have been derived, has not been under a title which was *bonâ fide* believed by him or them to have conveyed a right of property to the possessor.

Time for contesting awards of revenue authorities.

For the greater security of possessory titles in the Presidency of Bengal derived from awards made by the revenue authorities under Regulation VII., 1822, Regulation IX., 1825, and Regulation IX., 1833, it has been enacted—(*a*)

That after the 10th day of June 1848 no suit for contesting the justice of any award, made before the 10th June 1848, by the revenue authorities under any of the abovementioned regulations, shall be entertained by any Court where twelve years have elapsed since the date of the final award. That after the 10th June 1851 no suit shall be entertained for contesting the justice of any such award made before the 10th June 1848.

That no suit for contesting the justice of any such award made after the 10th June 1848, shall be entertained after the expiration of three years from the date of the final award.

SECTION II.

THE CAUSE OF ACTION.

What is the cause of action.

In considering the practical application of the enactments which have just been stated, it is necessary in the first place to ascertain precisely in each case what is the original cause of action, from the date of which the period of limitation is to be computed.

One frequent source of litigation is the possession by one man of land or other property alleged to belong to another.

Possession is the detention or the enjoyment of a thing, or of a right, which a man holds or which he exercises

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(*a*) Act XIII., 1848.

either by himself, or by another who holds or exercises it in his name.

Cause of action in case of ouster.

When a man is wrongfully ousted from the possession of that which he previously possessed, the cause of action arises at the moment when the privation of right occurs.

By order of Magistrate.

Where, for instance,(*b*) he is deprived of his right by an order of a Magistrate by which the possession is declared to be with another, and such order is afterwards affirmed by the Commissioner, the time runs from the date of the order and not from the date of its being affirmed. Where property is wrongfully(*c*) attached and sold in execution of a decree, the time runs from the sale and not from the attachment, for the attachment does not change the possession, though it imposes a clog upon it.

Sale in execution of decree.

A man died leaving a widow, and in consequence of her failing to adopt a son, certain property of her husband passed into the possession of other branches of the family. Nineteen years after they had taken possession, and twenty-seven years after the death of her husband, the widow adopted a son and claimed the property on his behalf. The claim was held to be barred by the law of limitation, although it was contended that under the Hindoo law, the plaintiff was still entitled to sue.(*d*)

Where prevented from taking possession.

When a man is wrongfully excluded from the enjoyment of that which he has not possessed, the cause of action arises at the time when he first becomes entitled to demand such enjoyment.(*e*)

Inheritance.

Where a son or other relative claims as heir to his ancestor, the time runs from the death of the ancestor,(*f*) and any person who possesses the property otherwise than in the name and in right of the heir, is considered to hold it adversely to him. Thus, where an estate was possessed by the ancestor's widow, who had no right in the property, except the right to receive food and rai-

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(*b*) S. D. 1846, p. 378, Infra, p. 64.

(*c*) S. D. 1849, 15th February, p. 38.

(*d*) S. D. 20th March, 1845, v. 7, p. 194. See S. D. 1849, 18th December, p. 461.

(*e*) 2 Moore's Indian Cases, 441, and see Sel. Rep. 12th June, 1849, v. 7, p. 316, said to be under appeal.

(*f*) S. D. 1845, p. 47.

ment during her life, her possession was decided to be adverse to the heir, and not such as could keep alive his right of action after the lapse of twelve years from the death of the ancestor.

Where a widow claims to inherit from her husband, the time runs against her from her husband's death.(*g*)

Dower.

The period of limitation is reckoned against the claim of dower, from the time when it becomes legally demandable. Where (as is frequently the case among Mussulmans) part of the dower is payable immediately on marriage, and part on the dissolution of the marriage by the husband's death or by divorce; the former portion cannot be sued for after the lapse of twelve years from the celebration of the marriage, and the latter cannot be sued after the lapse of twelve years from its dissolution.(*h*)

Where persons make a partition of a joint estate, including debts outstanding, and one of them afterwards realizes an outstanding debt, the others may sue him for their share of the debt at any time within twelve years from the realization.(*i*)

Latest payment of interest on debt.

With reference to debts generally, the period of limitation is calculated from the latest day on which interest was paid by the debtor to the creditor.

Instrument for securing payment of money.

In the case of a bond or other instrument for securing the payment of money, the cause of action is considered to arise when the money becomes payable.(*j*)

And a bond, granted to secure the payment of an old debt, constitutes a fresh cause of action.(*k*)

Promissory note.

Upon a note payable at sight the time runs from the day when it is presented for payment. Upon a note payable by instalments, from the several dates when the instalments fall due.

Conditional debt.

In the case of a conditional debt, from the fulfilment of the condition.

(*g*) S. D. 1845, p. 408.

(*h*) Sel. Rep. v. 1, p. 103, and 26th June, 1841, v. 7, p. 40.

(*i*) Sel. Rep. 26th January, 1848, p. 425.

(*j*) Con. 196, 1st March, 1815; Sel. Rep. 23rd March, 1842, vol. 7, p. 77; Reg. XXIII., 1814.

(*k*) S D. 1845, 22nd February, p. 32, See p. 65.

In the case of a guarantee, from the happening of the event against which the guarantee was given, that is, from the time when the principal makes default. Guarantee.

Upon a warranty as to the quality of goods sold, from the time the goods turn out to be otherwise than they are warranted.

In the case of a surety seeking to recover from his defaulting principal, the time runs from the date of his payment of the debt, or of each instalment, if he has paid it by instalments. Surety.

In the case of goods sold, if no specific credit be agreed upon, the time begins to run from the day of the sale; but if specific credit be agreed upon, it runs from the expiration of the credit. Goods sold.

Where the suit is brought by one man against another for breach of any duty towards him, as in the case of suits by a party against his pleader under Regulation XXVII., 1814, Section 12, or under Regulation XXVIII., 1814, Section 15, Clause 3, the time runs from the date of the breach of duty, and not from the date on which damage was sustained in consequence of it. Breach of duty.

The rent of land which, by the tenure under which it is held, is liable to a variable assessment, is an annually recurring cause of action; and the rule of limitation does not bar a suit for enhancing the rent of such land.(*l*) Suit to enhance annual rent.

Where Hindoos are entitled to require the performance of certain ceremonies by the members of their family, each refusal to perform the ceremonies constitutes a separate ground of action.(*m*)

A decree awarding maintenance for life constitutes a perpetually recurring cause of action, and in a suit instituted to obtain the benefit of it by subjecting certain property to its operation, maintenance may be ordered out of that property Maintenance.

(*l*) Sel. Rep. 3rd December, 1845, v. 7, p. 217.

(*m*) R. S. C. 5th January, 1842, p. 21.

retrospectively for twelve years before suit, and in all time coming.(n)

Diluvion.

Where land has been washed away, a suit may be brought for reduction of rent in respect of the injury thereby sustained, at any time within twelve years after the time when the land was so lost.(o)

Where it is gradual.

If the loss of land was gradual, and was in part sustained upwards of twelve years before the commencement of the suit, it seems uncertain whether the suit can be successful in respect of that part.

Probably this ought to be regulated by the nature of the injury. Where the action of the water on the land has been such that it was impossible to ascertain exactly the amount of damage done in each year, it would be fair to reckon the period of limitation only from the time when the diluvion ceased. But where its effects, from year to year, have been distinctly visible, all questions connected with it ought to be brought forward without delay, since it is extremely difficult to investigate the progress of diluvion after any considerable lapse of time.

The law which gives a special remedy, by summary suit within a year, for wrong suffered by illegal distraint,(p) does not abridge the right of action previously existing in respect of that injury, according to the regulations:(q) although of course the plaintiff cannot recover the penal damages given by Section 6, Regulation XVII., 1793, unless he sues within a year under the general rule as to penal damages,(r) and this principle applies to all special and summary remedies.

Limitation bars representatives.

When the prescribed period has begun to run, as against any man, those who derive title under him, whether by purchase or gift, or inheritance, (with the exceptions, of course, specified in the regulation) are subject to its operation, pre-

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(n) S. D. 1847, 6th September, p. 517.

(o) Sel. Rep. 23rd July, 1845, v. 7, p. 209.

(p) Reg. V., 1812; Con. 467.

(q) S. D. 1849, 10th May, p. 147.

(r) Reg. II., 1805, Sec. 7.

cisely as he could have been if he had lived and had continued entitled.(*s*)

As regards all rights and claims not confined within the limits of the estate purchased, a purchaser, whether at a private sale or at a judicial sale, in execution of a decree, or at a public sale for revenue,(*t*) takes only what his predecessor had to give or to forfeit, he purchases it, subject to all the conditions and relations, as to the law of limitation or otherwise, upon which it was held by the previous possessor. Thus if the owner of estate A. has claims as such owner, to a portion of the land which is held as part of the adjoining estate B., but six years have run against such claim at the time when estate A. comes into his possession by purchase of any kind,—he has only six years remaining for the prosecution of his claim.

Right of purchaser at revenue sale to quash previous leases.

By private sale, or by judicial sale in execution of a decree, the leases granted by the former zemindar are not affected; and if an action be brought by the purchaser to set aside any such lease, the lessee is entitled to reckon the period of limitation in his own favour from the date of the lease. But a revenue sale sets aside the leases of the former zemindar, with certain exceptions; and if the purchaser sues to oust a party holding by such a tenure, the time of limitation is to be calculated only from the date of the sale, for it was then that the cause of action accrued.(*u*)

Claim once barred cannot be revived.

When a man's right of action has once been barred by the law of limitation, it cannot, under any circumstances whatever, be revived in the person of his heir, or of any one claiming under or through him.(*v*) It does not pass from him at the end of the twelve years to the person who would be entitled to sue if he had died within the period of limitation, but it becomes absolutely extinguished for the benefit of the person in possession.

(*s*) Sel. Rep. 25th January, 1825, v. 4, p. 14.

(*t*) S. D. 1848, 16th September, p. 822.

(*u*) S. D. 1849, 13th June, p. 203.

(*v*) Sel. Rep. 4th January, 1837, v. 6, p. 139.

But as a Hindoo childless widow takes only a limited interest in her husband's estate,(w) and as the heir, on her decease, takes the estate by inheritance from her husband and not from her, it is a question how far her failure to sue during twelve years, brings the law of limitation into operation against the heir,(x) and how the rights of the widow and the heir, as between themselves, are affected by this default.

The rule not strictly construed against claimant.

The law of limitation is so far penal in its nature, that the Court will not construe the language of the pleadings very strictly, when a literal construction would bar the claim. Where the dispossession which constituted the ground of action was stated by the plaintiff to have occurred "in the beginning" of a year, and the action would have been barred if this expression had been construed to mean the very beginning of the year, it was held that any time within the first quarter of the year might be intended.(y)

Indian rules of limitation supersede those of other countries.

An action is barred by the rule of limitation, as against persons subject to the jurisdiction of the Company's Courts, when the period prescribed by the laws of this country has elapsed, although it may not have been barred by the law of the country wherein the cause of action arose.

SECTION III.

FIRST EXCEPTION TO THE TWELVE YEARS' RULE—DEMAND AND ACKNOWLEDGMENT.

First exception to 12 years' rule.

THE first exception to the twelve years' rule of limitation is where the complainant can shew by clear and positive proof that he had, within twelve years before the commencement of the present suit, demanded the money or matter in question, and that the defendant had admitted the truth of the demand, or promised to pay the money.

(w) S. D. 1849, pp. 409, 410.
(x) S. D. 1848, 19th February, p. 97.
(y) S. D. 1849, 18th December, p. 461.

Admission by agent of Government.

The operation of the rule of limitation is barred by an admission, within twelve years, of the plaintiff's right in an official proceeding of a servant of the Government; as where the salt agent officially acknowledges a right to compensation for salt khelarees which have been taken by the Government.(*z*)

By part payment.

It is barred by the payment of an instalment on a bond, or the execution of a fresh security.(*a*)

Not by offer of compromise.

The simple offer of a specific sum by way of compromise does not involve an admission of the justice of the plaintiff's demand, so as to suspend the operation of the rule of limitation; for such offers are frequently made merely with a view to escape litigation.(*b*)

Where suit is brought upon two bonds, one dated within, and one previous to the period of limitation, and the second contains an acknowledgment of the money due on the first, and a promise to pay the same, the suit is not affected by the rule of limitation.(*c*)

If the admission be explicit, the form and manner of making it are unimportant, and it is valid for the purposes of this law, though it be made in the course of miscellaneous proceedings.(*d*)

Acknowledgment after 12 years ineffectual.

A simple written acknowledgment of the truth of a demand is not sufficient to constitute a new ground of action, so as to bring within the cognizance of the Courts a suit, the prescribed period for instituting which *has once fully elapsed*.(*e*)

Where maintenance amounts to acknowledgment.

Where a man who is a co-sharer in joint property dies, leaving a widow who is his heir, the period does not run against her while she continues to receive maintenance, from those in possession, on account of her right to her husband's share.(*f*)

But the real nature and intention of payment by the party in possession must be examined, for nothing can be inferred

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(*z*) Sel. Rep. 22nd December, 1836, v. 6, p. 135.

(*a*) S. D. 1845, p. 193; S. D. 1847, 22nd June, p. 277. See S. D. 1849, p. 69.

(*b*) Bhaeechund *versus* Pertabchund, 1 Moore's Ind. Cases, 154.

(*c*) S. D. 1846, 18th June, p. 230.

(*d*) Sel. Rep. 16th August, 1847, v. 7, p. 383. See S.D. 1850, 3rd Jan., p. 3.

(*e*) Con. 196, 1st March, 1815.

(*f*) S. D. 1845, p. 293.

from mere presents, or acts of bounty, especially between persons connected by blood.(g)

SECTION IV.

SECOND EXCEPTION TO THE TWELVE YEARS' RULE—WHERE PROCEEDINGS HAVE BEEN HAD.

Second exception.

THE second exception to the twelve years' rule of limitation is where the complainant can shew that he directly preferred his claim within that period for the matters in dispute, to a Court of competent jurisdiction to try the demand, in which case he must assign satisfactory reasons to the Court for not having proceeded in such former suit.

When and how proceedings must have been had.

The claim must have been directly preferred in the ordinary course of law. It is not enough, that the plaintiff has made summary or miscellaneous applications to a Civil Court connected with the matters in dispute(h) such as a summary application for the review of a judgment passed in a regular suit.(i)

What proceedings insufficient.

Whether application to Magistrate sufficient.

It was decided in a recent case(j) by two Judges of the Sudder Court, that an application by either party to the Magistrate for possession under Regulation XV., 1824, prevents the operation of the rule, but the third Judge dissented, upon weighty grounds, from this conclusion.

A man who was originally dispossessed by the Magistrate under Regulation XV., 1824, may sue for possession at any time within twelve years from that act of the Magistrate.(k)

What is a competent Court.

An application to the supreme power in a state not then forming part of the British dominions, has been held, after the incorporation of that state with the British dominions, to

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(g) 1 Moore's P. C. C., 19, 34.

(h) Sel. Rep. 6th October, 1841, v. 7, p. 50.

(i) Con. 813, Cal. C. 16th August, West. C. 6th September 1833, S. D. 1847, 16th September, p. 545. See S. D. 1848, 28th March, p. 246.

(j) S. D. 1847, 12th May, p. 141.

(k) S. D. 1847, 30th June, p. 294, Supra, p. 57.

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be an application to a competent court, and to exempt the applicant from the operation of the rule of limitation.(*l*) But this decision is to be taken in connexion with what has been stated above as to the periods of limitation established in different provinces.

Application to sue as a pauper.

In calculating the period of limitation, no allowance is made for the time during which an application for permission to sue as a pauper is pending in Court,(*m*) for such application is merely preliminary to the institution of a suit; and the circumstance that the petition to sue as a pauper and the petition of plaint have been written together, so as to form but one document, makes no difference,(*n*) for it can have no effect as a plaint until the applicant has been authorized to present one.

Where there has been nonsuit; Or permission to sue again.

Where there has already been a suit before a competent tribunal for the matter in dispute, which suit has ended in a nonsuit, or in dismissal with permission to sue again, the period of limitation is computed from the accruing of the original cause of action, the time while the first suit was pending in the Courts being deducted.(*o*)

Down to what day the period is reckoned.

The period of limitation ends on the day when the plaint is duly lodged by the complainant in a Court of competent jurisdiction, not on the day when the suit is placed by the Sudder Court upon the file of the Court which they deem most proper to try it;(*p*) nor upon the day when the plaint is numbered and sent for decision: for if there be any delay in that process, it is the delay of the Court and not of the plaintiff.(*q*)

But the period during which a suit is pending, which is finally struck off for default, does not prevent lapse of time under the law of limitation.(*r*)

(*l*) Jewajee *v.* Trimbukjee, 3 Moore's P. C. 138.

(*m*) Sel. Rep. 30th January, 1838, v. 7, p. 8; 14th June, 1842, v. 7, p. 96; S. D. 1848, April 22nd, p. 360.

(*n*) S. D. 1849, 18th December, p. 466.

(*o*) S. D. Sel. Rep. July 26th, 1847, v. 7, p. 375; S. D. 1848, pp. 3, 246, 880, 891,——1849, pp. 84, 322.

(*p*) S. D. 1846, p. 291.

(*q*) S. D. 1849, June 27th, p. 252.

(*r*) Act XXIX., 1841, Sec. 2; S. D. 1849, 5th July, p. 270.

Where the permission given is not a permission to sue again generally, but to sue after a certain event, such as the decision of a different suit, the deduction should extend up to the time when the event happened; because the order of the Court in effect, restrains the party from proceeding in the meantime.(*s*)

The widow of a deceased Mussulman, having taken possession of her husband's property, was sued by his heirs(*t*) for that property, within twelve years after the date of his death. She claimed to retain the property for the payment of her husband's debts, including the dower debt due to herself. The Court decreed in favour of the plaintiffs, and referred the defendant to a separate suit to establish her Dower debt. Soon after the final decision of this cause, but upwards of twelve years after her husband's death, the widow sued his heirs for her Dower debt. It was decided that her claim was not barred by the law of limitation. There was no one whom she could sue, while she herself retained the property.

It has been not unusual for judicial officers of every grade to add to their decrees a declaration that some person who may or may not be before the Court, may sue hereafter for the whole or some part of the subject matter of the suit—and such declaration or permission has been occasionally regarded as marking a new term, from which the period of limitation is to be reckoned.

But it is very clear that a permission or declaration of this kind is mere surplusage in a decretal order, except in so far as it shews that the Court pronouncing the order does not thereby intend to decide against the person whose rights are thereby reserved, or to prejudge claims which either are not before the Court at all, or are not before it in a proper state for adjudication. Such an order cannot control existing legal disabilities; it does not constitute a right, nor can it form a cause of action.(*u*)

(*s*) See S. D. 1847, 31st July, p. 386.

(*t*) Sel. Rep. 24th March, 1831, v. 5, p. 105.

(*u*) Sel. Rep. 30th September, 1847, v. 7, p. 399; S. D. 1849, September 12th, p. 392.

Proceedings must have been to enforce the same right.

The operation of the rule of limitation is not prevented by the circumstance that the complainant has during the interval been engaged in suing the same defendant upon a different cause of action(*v*) or that he has been litigating against other persons than the defendant, a question material to his claim against the defendant.

Thus where a man who had been engaged in establishing against his brother a general gift to himself of all his father's property, sued strangers, after the lapse of twelve years from his father's death, for land which he alleged to have belonged to his father, he was held to be barred by efflux of time.(*w*)

Where the rule has been relaxed.

A personal claim was held not to be barred by lapse of time where a suit was instituted to enforce it withitin twelve years after the decision of a former suit between the same parties, in which suit the validity of the engagement on which the new suit was founded, had been put in issue (though it was not the main question in issue.) This decision might be right with reference to the peculiar circumstances of the case, but strictly speaking the complainant ought to be prepared to shew that the former proceedings were taken for the same purpose as the present suit; and not merely that the same facts were put in issue: for the issue might have been the same, while the object of the suit was different.(*x*)

The rule ought to be strictly applied.

The pendency of proceedings will not exempt a claim from the operation of the law of limitation, if such proceedings have their origin wholly in mistake or fraud, and would not have been permitted but for the Court's ignorance of the truth.

Certain land was decreed to A. in 1802, and it was judicially acknowledged by him in 1806 that possession had been given accordingly, but the question was afterwards revived, and remained open till 1835, when the Judge struck the case off his file of execution of decrees, recording his opinion, grounded upon this acknowledgment, and upon inquiries made under

(*v*) Sel. Rep. 28th May, 1838, v. 6, p. 231.

(*w*) Sel. Rep. 25th January, 1825, v. 4, p. 14.

(*x*) Sel. Rep. 5th December, 1831, v. 5, p. 151, Supra, p. 41.

his own directions, that possession had been given in 1805.(y) A suit by the heirs of A. for possession of the same lands, grounded on the assertion that possession had never been really given, was held to be barred by the law of limitation, although brought within twelve years from 1835.

A suit, not being a pauper suit, will be exempted from the operation of the rule, if proceedings which form an essential preliminary to the particular suit have been instituted within the twelve years.

Where the object was to set aside a sale made under a decree of the Supreme Court, and to obtain possession of the property from a person who derived his title under the purchaser at that sale, but who was not subject to the jurisdiction of the Supreme Court, the plaintiff within twelve years from the sale, instituted proceedings in the Supreme Court, under which the sale was set aside. And as this was necessary to be done before he could sue for the possession in the Mofussil Court, it was held that his suit in the Mofussil Court was in time, although the twelve years had expired.(z)

Possession by one sharer does not keep alive the right of another.

A person who sues for land as a joint sharer, is barred if he has been more than twelve years out of possession, although one of the co-sharers may have obtained a decree in his own favour within twelve years.(a)

Peculiar law in Benares.

In the province of Benares indeed,(b) and owing to circumstances which had occurred previous to its cession to the British power, a rule was passed under which the possession of any one or more of the putteedars, or sharers, within the limited period, was to entitle to restoration, all the other persons having a right to claim as putteedars. But even under this rule, the general law of limitation operates against the putteedars at large, from the date of the decree awarding the right of one of their number.

(y) S. D. 1849, 23rd May, p. 161.

(z) Sel. Rep. 16th June, 1842, v. 7, p. 97, and see the case last cited.

(a) R. S. C. 25th March, 1848, p. 137.

(b) Reg. XXII. 1795, Sec. 35, Cls. 2, 3, 5; Con. 980.

Where the complainant has really endeavoured within the prescribed time to obtain redress, he has been exempted from the operation of the rule, even though his claim may have been preferred to an authority which cannot strictly be called a Court of competent jurisdiction to try the demand.

To what authority application must have been made.

Thus where land was sold for revenue in 1803, and the owner during four years after the sale fruitlessly petitioned the Collector to set it aside, and in 1813 sought redress from the Board of Revenue from which he only in 1817 received a reply, giving him leave to sue in the Civil Court, it was held that a suit brought in 1819. to cancel the sale was not too late.(c)

In the case just mentioned, the petition of the complainant, was actually pending before the Board in 1815, when the period of twelve years from the date of the cause of action expired.

But where(d) a person, in like manner, objecting to a revenue sale of 1803, petitioned the Civil Court, which apparently in 1807 referred him to the Board of Revenue, to which he applied in 1817, and was in 1818 referred back to the Civil Court in which he instituted a suit within twelve years from the last reference, it was held that as no application for redress was pending before any authority in 1815, when the period of twelve years expired, his claim was barred by the law of limitation.

SECTION V.

THIRD EXCEPTION TO THE TWELVE YEARS' RULE—DISABILITY.

Third exception.

THE third exception to the twelve years' limitation is where the complainant can prove that from minority or other good and sufficient cause, he had been precluded from obtaining redress.

(c) Sel. Rep. 31st January, 1832, v. 5, p. 168.

(d) Sel. Rep. 12th August, and 9th September, 1836, v. 5, p. 175, (also Con. 1036.)

Rule does not operate during minority.

Where an original right accrues to a minor, such as the right to succeed his father in property of which the father died possessed, the period of limitation in respect of suits to enforce such right does not begin to run until the expiration of the minority.(*e*)

Where a right against which the period of limitation has already begun to run, devolves upon a minor, the operation of the rule is suspended until he attains his majority; that is to say, the time which intervenes between the devolution of the right, and the attainment of legal ability, is deducted in computing the period of limitation.

Period of minority deducted.

Order for removal of guardian — *primâ facie* evidence of age.

If the minor be under the tutelage of a guardian appointed by the Court of Wards, the minority is considered to have terminated at the date when such guardian was removed by that Court; and this is good *primâ facie* evidence of the age of the party.(*f*)

If the evidence as to the age of the party alleging minority be such as to lead to no certain conclusion, the presumption is in favour of minority.(*g*)

Omission of guardian does not bind ward.

The fact, that there has been a guardian and that he has neglected to sue, does not prevent the ward from suing after he attains majority.(*h*)

But a right of suit, once barred by time, cannot be revived in consideration of the minority of any person, upon whom, but for such bar, it would have devolved.(*i*)

Insanity.

Madness has the same privilege as minority.(*j*)

Imprisonment.

And it is said that a similar immunity exists with respect to imprisonment.

Coverture.

Married women who can sue alone are entitled to no immunity.

(*e*) Sel. Rep. 22nd June, 1807, v. 1, pp. 190, 192, Ibid, March 2nd, 1848, v. 7, p. 443.

(*f*) S. D. 1848, 5th July, p. 644.

(*g*) S. D. 1849, 18th December, pp. 461, 463.

(*h*) Sel. Rep. 2nd March, 1848, v. 7, p. 443; S. D. 1848, 6th June, p. 513; Ibid, 13th July, p. 676; S. D. 1849, October 23rd, p. 398.

(*i*) Sel. Rep. 4th January, 1837, v. 6, p. 139.

(*j*) Sel. Rep. v. 3, p. 162, v. 7, p. 336, S. D. 1846, p. 410.

But it would seem that English married women, who enjoy by the law of their own country the same exemptions in this respect as are extended to infants, ought to be considered as having been disabled to act during their coverture.

Absence in foreign country.

Where a person is absent in a foreign country when the right of action arises, the rule does not begin to operate against him till he returns.(*k*) But if he voluntarily goes abroad after the right has accrued to him he is not excused.

The residence of the debtor beyond the limits of the jurisdiction of the Company's Courts, is not a good and sufficient excuse for the delay of the creditor to sue within twelve years, unless it be shewn that the debtor has not been resident in a country where the creditor could have procured redress if he had attempted to do so.(*l*)

Residence at a distance.

The residence of a female complainant at a distance of many hundred miles from the lands in dispute, has been held to be no excuse for her delaying to sue within twelve years, there being circumstances to shew that she must have had early notice that her rights had been usurped by some one.(*m*)

SECTION VI.

OPERATION OF THE SIXTY YEARS' RULE—CLAIMS BY GOVERNMENT.

Not to be enforced by executive power.

WHERE the Government has lost its right to sue, it will not be permitted to put itself in possession by any exertion of executive power.

The Government, having a claim to land in Bengal (Chittagong) which was not capable of being enforced by suit, by reason of the cause of action having arisen previous to 1765,(*n*) which was at that time the utmost period of limitation in Bengal,

(*k*) See Sel. Rep. 22nd February, 1834, v. 5, p. 342, 1 Moore's P. C. C. 45, 46.

(*l*) Bhaeechund *v.* Pertabchund, 1 Moore's Ind. App. 154.

(*m*) Sheik Imdad Ali *v.* Mussumat Kootby Begum, 3 Moore's Ind. App. 1.

(*n*) Reg. III. 1793, Sec. 14.

took forcible possession of the land in 1800. The persons dispossessed sued Government in 1804, and recovered the land by a decree of the Sudder Dewanny Adawlut.(*o*)

Claims by Mutwallee of wukf.

It is an acknowledged duty of the Government(*p*) to provide that endowments for purposes deemed pious and beneficial, be applied according to their real and original destination. A person therefore who is appointed mutwallee or trustee or superior of a religious endowment or wukf, becomes thereupon the authorized agent of the Government for the protection of the endowment; and, as it is said, the founder and the mutwallee are one and the same. Where the endowment is perpetual, the duty of protection is a public and perpetual duty of the Government.

If the office of mutwallee has been long vacant, and the mutwallee who is at length appointed, brings his suit within twelve years from the date of his appointment, then the enjoyment of the property by the defendant for twelve years and upwards affords no defence to the suit, for the mutwallee had no power to sue till he was appointed.(*q*)

But this principle is applicable only to a plaintiff who is neither heir nor representative of his father in respect of the property sued for, and who derives his right to property of the nature of wukf, from an express personal appointment, and there is no pretence for extending the rule to suits by the Nawab Nazim of Bengal.(*r*)

SECTION VII.

OPERATION OF THE SIXTY YEARS' RULE—PRIVATE CLAIMS.

Time reckoned from discovery of fraud.

In a claim for lands, of which possession has been fraudulently obtained, the period of limitation is not reckoned from

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(*o*) Sel. Rep. 30th August, 1815, v. 2, p. 156. See p. 14 supra.

(*p*) Reg. XIX. 1810.

(*q*) Jewan Das Sahoo *v.* Shah Kubeer-ooddeen, 2 Moore's P. C. C. pp. 422, 423.

(*r*) S. D. 1849, 21st March, p. 75.

the time when the fraud was committed, but from the time when it was discovered(*s*) or when there was a probable opportunity of discovery, so that it might with reasonable diligence have been found out.

What will taint origin of title.

It is difficult to define the circumstances which will induce a Court to regard a title as tainted in its origin with violence, fraud, injustice or dishonesty.

Literally speaking, every possession which is not strictly lawful might be held to fall within one or other of these descriptions.

It is obvious, however, from the third Clause of the section that it is not intended to include every acquisition without a just title, for by that clause, acquisitions are protected that have been obtained by any title which was believed by the acquirer to be just and valid, though it was in reality insufficient.(*t*)

Good faith presumed.

Good faith is always presumed; and to avoid the effect of lapse of time, the plaintiff must establish, by proof, the existence of conscious injustice at the time of the acquisition.

Subsequent fraud does not vitiate title.

It is enough that good faith has existed at the moment of the acquisition, *i. e.*, subsequent fraud alone, however, reprehensible in itself, does not vitiate previous honest possession. Yet the imputation that fraud was employed in the original acquisition of the property may be strengthened by circumstances in the subsequent conduct of the party to whom the fraud is imputed, such as the abstraction of the muniments of title which are impugned as fraudulent.(*u*)

Title originating in a violation of public or private duty.

In judging of the question of good faith, the Courts have laid stress on the fact that the title originated in a lease taken by a public officer in violation of his duty; and a violation of private duty, such as a purchase, by an executor, or guardian,

(*s*) Sel. Rep. v. 1, p. 239, 30th September, 1847, v. 7, pp. 399, 407.

(*t*) Sheik Imdad Ali *vs.* Mussumat Kootby Begum, 3 Moore's Ind. Ca. 1, Supra, p. 55.

(*u*) Sel. Rep. 19th February, 1833, v. 5, p. 268. Ibid, 9th September, 1833, v. 5, p. 323.

of the property entrusted to him, would no doubt suggest a like unfavourable inference.(*v*)

Thus the Courts would judge unfavourably of the commencement of a title resting only on an alleged gift to a member of her husband's family, by a Hindoo widow, whose right notoriously does not extend beyond a life interest of an imperfect kind, and a transfer from whom could not, therefore, be considered by the donee to convey to him a permanent right of property.(*w*)

Possession given, even if erroneously, in execution of a decree of Court, is not regarded as a dishonest means of acquisition within the meaning of the Regulations.(*x*)

Presumption in favour of possessor.

Where the early history of a title cannot be very clearly ascertained, the Courts will readily make any reasonable presumption of fact in favour of a party who has long been in quiet occupation, and of the validity of the act by virtue of which the possession took place; and the burden of proving those circumstances which render it invalid in point of law, if the nature of the case requires such proof, lies on the other side.(*y*)

The person in actual possession who can prove that he was in possession at a former given period, is presumed to have possessed during the interval, unless the contrary be proved.

For the purposes of limitation there must be possession continued and not interrupted, peaceable, public, unequivocal, grounded on an alleged title of ownership.(*z*)

Forcible possession how legalized.

A man took forcible possession of land situated in a territory subject to the Government of Oude. He afterwards obtained from that Government a charter of confirmation, and having occupied the land quietly for ten years after the confirmation

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(*v*) Sel. Rep. 13th March, 1826, v. 4, p. 130, Supra, p. 52.

(*w*) Sud. Dec. 1849, 5th April, p. 102.

(*x*) Sud. Dec. 1849, 26th April, p. 125.

(*y*) Sel. Rep. 17th May, 1824, v. 3, p. 354, 2 Knapp P. C. C. p. 220.

(*z*) See S. D. 1849, August 29th, p. 371.

he died, and his son held quiet possession for ten years after his death. The son was then sued for the land in the Courts of the East India Company to whom the territory had in the meantime been ceded: it was decided that the original forcible seizure had been cured by the confirmation and the long occupation.(*a*) The meaning of this decision no doubt was, that the confirmation formed the commencement of a good title and that at the end of twelve years from that event the title became complete in the son, and would have become complete in the father if he had lived so long.

Indulgence. Persons under disability.

Where a title originally vitiated has been cured, as against people who have been under no disability, by twelve years *bonâ fide* possession, the plaintiff may still recover if he can bring himself within the exceptions noticed above.(*b*)

Effect of delay where title not cured.

Where a title originally unjust has not been rendered valid by some of the circumstances abovementioned, it would seem that the delay of the complainant to sue is only so far considered, as it tends in some degree, if unexplained, to throw discredit on his claim.(*c*)

Profits of land not within the 60 years' rule.

The exception by which a remedy of longer continuance is granted in the case of immovable property, as against persons claiming under a vitiated title, does not extend to the profits of that immovable property, which can only be claimed for twelve years next before the date of the institution of the suit.(*d*)

Nor idols.

It has been ruled that the sixty years' limitation being confined to lands, houses and other immovable property, does not apply to suits for the temporary or absolute possession of idols, even where fraud or violence may be alleged.(*e*)

(*a*) Sel. Rep. 2nd September, 1808, v. 1, p. 253. Ibid, 27th February, 1811, v. 1, p. 314.

(*b*) Sel. Rep. 13th March, 1826, v. 4, p. 130.

(*c*) Sel. Rep. 31st May, 1831, v. 5, p. 123. Ibid, 13th May, 1826, v. 4, p. 130. Ibid, v. 4, p. 89.

(*d*) Sel. Rep. 9th September, 1833, v. 5, p. 323.

(*e*) S. D. 1847, p. 512. Qy. as to the Hindoo law; See Colebrooke on Inheritance, p. 133.

SECTION VIII.

MORTGAGE AND DEPOSIT NOT BARRED BY TIME.

Mortgagor not barred.

THE rule which exempts mortgages and deposits from the influence of the law of limitation, is inflexible(*f*) and has been applied in favour of an heir after the lapse of fifty years from the time when the mortgagee or depositary was put in possession.(*g*)

Conditional sales are barred.

The rules of limitation apply to conditional sales.(*h*)

Mortgagee must sue within 12 years.

This rule has no application to suits by a mortgagee, who is bound to bring his action for foreclosure of the mortgage, within twelve years from the expiration of the year of grace allowed to the mortgagor for redemption.(*i*)

Where a debt has been contracted on the security of land, as, for instance, where the borrower grants to the lender a deed in which he stipulates that the latter shall hold possession of the land until the advance shall be satisfied,—the law of limitation does not apply, and the borrower is held responsible for the debt, until it be proved that the debt has been satisfied from the produce of the land, or by other means.(*j*)

What is not deposit.

An entry in an account-book, whereby a man debited himself with a sum of money payable to a female on her marriage, with interest in the meantime, (such sum being a gift from himself, and the fact of the entry not communicated to the party interested) was held not to make the sum so debited, a deposit, so as to keep alive the right of suit, if any such there

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(*f*) Supra, p. 55. Sel. Rep. 25th May, 1807, v. 1, p. 185. See S. D. 1847, November 24, p. 610.

(*g*) S. D. A. Sel. Rep. 17th March, 1812, v. 2, p. 4. Ibid, 19th September, 1832, v. 5, p. 236.

(*h*) Sud. Dec. 1846, p. 243.

(*i*) Sel. Rep. 11th September, v. 7, p. 45.

(*j*) S. D. 1846, 17th March, p. 105, S. D. 1848, 27th July, p. 722.

were, after twelve years from the event on which the money became payable.(*k*)

What is deposit.

But property of any kind given by a testator to his representative as trustee for a third party, is not possessed by the representative under a title *bonâ fide* believed to have conveyed a right of property to the possessor.(*l*)

If A. be directed to hold possession of an estate on the part of B., and to pay a certain portion of the produce annually to C. during her life, for her maintenance, this does not make A. a depositary on behalf of C. so as to prevent the period of limitation from running against any claim to the inheritance by her or by her heirs or representatives.(*m*)

Possession not by title of ownership.

The administrator is a trustee and depositary for the behoof of all persons interested in the succession, his possession is not adverse to them, and the rule of limitation cannot operate between him and them.

Acts of accommodation.

Acts of accommodation or of simple toleration do not constitute possession in the person accommodated or tolerated, so as to bring the rule of limitation into play.

Presumption as to possession.

A man is always presumed to hold possession for himself and by title of ownership, if it be not proved that he has begun to hold possession on behalf of another.

Managers.

But where a man can be shewn to have occupied property as manager for another, there is no possession upon which the rule of limitation can operate.(*n*)

When a man commenced his possession on behalf of another, he is presumed to continue in possession by the same title unless there be proof to the contrary.

(*k*) Sel. Rep. 15th May, 1844, v. 7, p. 161.

(*l*) Contra, Sel. Rep. 15th May, 1844. v. 7, p. 161, but qy. that case so far as this point is concerned.

(*m*) Gordon *v.* Moohummud Khan, 2 Knapp's Rep. 225.

(*n*) Sel. Rep. 16th December, 1805, v. 1, p. 118. See 1 Moore's P. C. C. p. 19.

How friendly possession may become adverse.

But a depositary or the heir of a depositary may alter the nature of his possession by opposing himself to the right of the proprietor; or he may be turned out by a third party, and may take possession again as owner. In either case, the period of limitation will run from the date of such alteration of possession.

Suits to resume lakhiraj tenures or to enhance rent.

Suits for the resumption of rent-free tenures, that is, not for the possession of lands so held, but to declare void the exemption from rent which they have enjoyed, and to assess a rent upon them, are not affected by the rules of limitation except where the grant and possession are of earlier date than 12th August 1765,(*o*) and they may be brought at any time, either by zemindars(*p*) or by putneedars;(*q*) and so may suits for enhancing the rent of mocurrureedars.(*r*)

Suit by ryot for measurement and reduction of rent.

And a ryot, who has paid an uniform amount of rent, as for a certain supposed quantity of land, for more than twelve years, but who is bound by no pottah or kubooleut or other express engagement, is not debarred from claiming a measurement of the land actually in his occupation, and a reduction of his jumma upon the pergunnah rates according to the result of such measurement: in the same manner as a zemindar has when not bound by express engagement, a claim to a like measurement.(*s*)

But there is nothing in the law which authorizes a distinction between the claim of a zemindar, suing for possession of lands in his zemindary against a party who has cultivated them without distinct title for more than twelve years—and any other claim of possession. The character of zemindar does not, in the case of possessory actions, confer any exemption from the ordinary rules of limitation.

(*o*) S. D. 1848, 20th May, p. 460, 16th December, p. 873.

(*p*) S. D. 1849, 15th March, p. 66.

(*q*) Reg. XIX., 1793, Cl. 1, Sec. 2; Reg. XIV. 1825, Cl. 2, Sec. 3; S. D. 1847, May 31st, p. 183; 1849, July 26th, p. 309.

(*r*) Sel. Rep. 3rd December, 1845, v. 7, p. 217; 20th May, 1848, v. 7, pp. 99, 505; Act I. 1845, Sec. 26; Act XII., 1841, Sec. 27.

(*s*) S. D. 1849, June 7th, p. 188.

SECTION IX.

APPLICATION OF THE LAW OF LIMITATION IN CASES OF JOINT OWNERSHIP.

Joint ownership.

THE ancestral property of a joint Hindoo family is divisible in due course of law.

When the right to partition is barred.

And this right is not barred by the rule of limitation, except where the shares have been actually severed and separately occupied; or where the sharer who claims a division has received from his co-sharers, or from one of them, a fixed allowance by way of maintenance, either in money or in land, as a compensation for his share; or where he has been absolutely excluded from the possession of the land and from participation in its profits. In such cases, if the period of limitation has elapsed since such transactions took place, the right to a division is barred.(*t*)

Separate engagements for rent do not bar it.

This principle applies, even although the joint proprietors may have entered into separate engagements with the Government for the jumma of their respective shares, (the shares not being actually divided,)(*u*) or although one of the joint proprietors has been solely registered as proprietor.(*v*) Among the proprietors themselves the right to a division continues.

Remittances to co-sharer.

Where a co-heir in possession of the joint property, remitted out of its profits, money and goods to a co-heir who was absent and had never taken possession, this was considered to amount to a recognition of the title of the latter, and to make the title of the former a friendly and not an adverse possession,

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(*t*) Con. 942, Cal. and West C. 3rd April, 1835; Sel. Rep. 21st September, 1825. v. 4, p. 91. Ibid, 15th January, 1808, v. 1, p. 25, S. D. 1845, p. 293.

(*u*) Sel. Rep. 13th March, 1823, v. 3, p. 219.

(*v*) Sel. Rep. 20th January, 1823, v. 3, p. 202.

and consequently a possession not affected, as between the co-heirs, by the law of limitation.(*w*)

But the mere fact that the person claiming the property has since the accruing of his cause of action received money and other things from the person in possession, will not bar the operation of the rule, if it be not shewn that the plaintiff has been in receipt of any portion of the profits of the estate.(*x*) The question will be, upon what ground and with what intention, the payments or gifts have been made.

(*w*) Sel. Rep. 22nd February, 1834, v. 5, p. 342.

(*x*) S. D. 1847, 19th May, p. 160, Supra, p. 63.

CHAPTER X.

SUITS MUST NOT COMPRISE TOO MUCH NOR TOO LITTLE.

EVERY suit ought to be so framed as to afford ground for such a decision upon the whole subject in dispute, at one and the same time, as may, if possible, prevent any further litigation concerning it.

Claims ought not to be split.

Were the rule otherwise, a man might be sued repeatedly in respect of different parts of the same matter, and conflicting judgments might be pronounced regarding separate portions of the same property, included in the same cause of action. And as the value of the property claimed by the plaint determines the class of Judges by which a suit is cognizable and the remedies of the parties in appeal,(y) a suit might be split up so that each branch of it should be decided by a Judge of a lower class than that by which, with reference to the value of the whole property in litigation, it ought to be decided, and the right of the parties to appeal would be unfairly limited.

The reason.

If, on the other hand, the suit is marked by the faults of misjoinder or multifariousness, that is to say, if it comprises several distinct claims all made by the plaintiff upon the same defendants, but which are wholly dissimilar in their nature, or if it is brought against parties, some of whom are unconnected with a large portion of the matters in question, the Court may be compelled, in the one case, to try several distinct lawsuits while it is nominally trying only one, or, in the other case, to keep parties before it, to their great damage, where the ends of justice do not require it.

Dissimilar claims ought not to be mixed.

Suits against persons only partially interested.

(y) Infra, Chap. XV.

Suits for inheritance must include entire claim.

It has therefore been settled that suits founded on a right of inheritance ought to include the entire claim arising out of the same cause of action;(z) that is to say, that a party suing for the real property of a deceased person whose heir he calls himself, shall sue for the whole of it at once.(a) The course to be adopted, where the property sued for is situated within different jurisdictions, will be stated hereafter.

Effect of suing for part of claim.

A man is not, indeed, prohibited from suing for a portion of his claim, but if he does so, he cannot afterwards sue for the remainder of it.(b)

Suit for principal without interest.

If he shall have sued for the principal of a debt, or for a proprietary right, and shall not have claimed in that suit the interest or the mesne profits (as the case may be) he cannot afterwards sue for the interest or mesne profits.(c)

Where bond descends to two.

If the right to receive a debt secured by bond, devolve, by inheritance, upon more than one person, the heirs may bring separate actions to recover the quota that each is entitled to.(d)

Real and personal property may be sued for together.

A man may sue in one action for the recovery of the entire estate, real and personal, which he has inherited from a person deceased.(e)

Heirs may sue the debtors of ancestor separately.

And each party indebted to the estate of a person deceased may be sued separately by the undoubted legal representative in estate of the deceased, for the entire amount he owes to it.(f)

Separate claim on joint contract.

Persons who have jointly entered into a contract are not entitled to subject the contractor to the inconvenience of dealing with them separately.

Where undivided property has been mortgaged by its joint proprietors, without specification of their several shares therein,

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(z) Cir. Ord. No. 29, 11th January, 1839.

(a) R. S. C. 20th January, 1848, p. 127.

(b) Cir. Ord. 30th September, 1847, para. 4, R. S. C. 20th June, 1847, p. 33. See Sel. Rep. 18th January, 1847, v. 7, p. 287, 3rd July, 1847, v. 7, p. 350.

(c) Cir. Ord. 30th September, 1847, para. 2.

(d) Sel. Rep. 18th September, 1847, v. 7, p. 392. See Act XX., 1841.

(e) Sel. Rep. 10th February, 1841, v. 7, p. 15.

(f) R. S. C. 20th January, 1848, p. 127.

to secure the repayment of a joint debt at a certain period, one of the proprietors cannot sue separately for the redemption of his own share.(*g*)

No doubt one proprietor might come forward on behalf of all to redeem the mortgage, and would then stand, as regards all his co-sharers, in the place of the original mortgagee; or if he were ready to make good his own proportion of the loan at the proper time, but suffered any loss by the default of his co-sharers in making good their proportions, he might have his remedy against them.

Partners should sue each other for whole demand.

In disputes between partners respecting mercantile accounts, the plaintiff ought to bring his action for the whole of his demand against the defendant, so that there may be a general adjustment of the accounts between them. He must not split the cause of action by suing for a particular item or items, for he might thus obtain a decree in his favour upon one item, though a full inquiry into the state of the accounts would shew a balance in favour of the defendant.(*h*)

Separate proceedings for separate matters.

If the matters or the persons are distinct, separate proceedings ought to be taken, unless there exists some connecting link, rendering a single suit convenient or necessary.(*i*)

Suit to reverse summary decree and for damages;—Where they may be joined.

Where a man's property is attached under a summary decision of the Collector for an alleged balance of rent due from him, he may sue in the Civil Court to reverse the summary decision, and he may also sue either in that action or separately, for recovery of the property attached, and for damages sustained by him in consequence of the attachment.(*j*)

Where they may not be joined.

A man cannot,(*h*) however, in one and the same suit, obtain the cancellation of a summary decree passed under one regulation;(*l*) and also obtain damages for an unjust attachment of his property under another regulation.(*m*)

(*g*) Sel. Rep. 25th November, 1841, v. 7, p. 53.

(*h*) Sel. Rep. 17th July, 1844, v. 7, p. 177.

(*i*) S. D. 1848, 6th May, p. 421.

(*j*) S. D. 1846, 19th May, p. 193.

(*k*) S. D. 1848, 26th February, p. 114.

(*l*) Reg. VII., 1799.

(*m*) Reg. V., 1812.

Where one suit may be brought to reverse two awards.

Where several awards have been made under Act IV. of 1840, by which a man has been ousted from certain lands, and where the question between him and the person in possession is simply whether these lands belong to one estate, or to another;—in such case, the person who has been ousted may sue in one action for the possession of all the lands.(*n*)

A man may sue in one action to establish his right to assess lands held by the defendant and for which he had not previously paid rent, and also to recover from him rent for other lands at a higher rate than he had previously paid.(*o*)

One suit for lands held by one title though dispossession was at different dates.

Where lands are held under one and the same title, and the holder is turned out of possession of all the lands by one person, at different times, he may sue the ejector for the whole of the lands in one action.(*p*)

One plaint claiming two estates on different titles.

But it is otherwise where there is not unity of title. A man cannot sue A. by the same plaint for possession of one estate because it was adjudged to him or his ancestor by decree against A., and for possession of another estate because he was wrongfully dispossessed of it by A.(*q*)

One may sue co-sharers in one action.

The shareholders in two different estates, being the same persons, one of their number liquidating the arrears due to Government in respect of both estates, may sue his defaulting co-shareholders for the amount in one action.(*r*)

Rent for each year may be sued for separately.

The rent of land for each year forms a distinct cause of action, and the rents of a series of years may be sued for together or separately, at the option of the plaintiff.(*s*)

Co-sharers of land privately divided may be sued separately.

Where an estate is held by several sharers in separate and distinct possession under a deed of partition, each may bring actions for rent against the tenant of the share assigned to himself, although the partition may have been only a private

(*n*) R. S. C. 2nd August, 1847, p. 114.

(*o*) S. D. 1848, 12th September, p. 812.

(*p*) R. S. C. 2nd August, 1847, p. 114, S. D. 1848, 19th July, p. 696.

(*q*) S. D. 1848, 6th May. p. 421, S. D. 1849, 23rd May, p. 161.

(*r*) R. S. C. 4th September, 1847, p. 118.

(*s*) S. D. 1846, 30th June, p. 252.

one, and the estate may still continue joint and undivided, so far as regards its responsibility to Government for the revenue assessment.(*t*)

Person seeking to enforce a general decree must sue occupants separately.

But where one man has obtained a decree against another, for a money claim generally, not affecting any property in particular, if he seeks to put this decree in execution, against the land of his debtor, he must bring separate suits against the persons in possession, as each may have acquired possession under a different title and may have a separate defence to make.(*u*)

Ryots joining in one cabooleut may be sued together.

Where there is a cabooleut or agreement to pay rent to a particular person signed by several ryots, they may all be sued upon it in one action.(*v*)

Claim on one ground against separate sharers.

The pergunnah A. was held in four shares, each share by its own zemindar, as a separate estate. The plaintiff and his ancestors held a moiety of thirteen talooks extending through different parts of the pergunnah, in one mokurreree tenure, as an entire estate (originating, it may be presumed, prior to the division of the pergunnah into four zemindaries,) and he paid his fixed rents to the four zemindars, according to the quantity of land which he held within their respective portions of the pergunnah. The zemindars ousted him, and he brought one suit against them all for the recovery of possession. It was argued that there ought to have been four suits because the talooks were spread through the four separate shares: but the Sudder Court decided that, as the claim was grounded on one foundation, and the tenure was one and entire, the suit was correctly brought against all the shareholders.(*w*)

Misjoinder of claims.

If the plaint comprises several distinct and separate demands which are wholly dissimilar in their character, this is a misjoinder of claims, and the Court will not permit them to be litigated in one suit, even although the plaintiffs and defendants are parties to the whole of the transactions which form the subject of the suit.

(*t*) S. D. 1848, 8th April, p. 297.

(*u*) S. D. 1845, 14th April, p. 110. Infra, Chap. XXVIII.

(*v*) S. D. 1847, 11th August, p. 418, 1848, 17th June, p. 543.

(*w*) S. D. 1848, 16th August, p. 769.

It is not competent, for instance, for A. to file a plaint against B. praying that a mortgage of land may be foreclosed, and that some entirely different transaction, such as the sale of a ship, may be set aside.

Claims against the same man in different characters.

Nor can a man institute a suit against another, seeking a decree against him personally in respect of transactions which have passed between them, and also charging him as executor of A. in respect of transactions between A. and the complainant. Here it is evident that the defendant is interested in every portion of the suit, but he is personally interested in one portion of it; and he is interested in the other portion of it, only as executor: the demands against him are distinct and unconnected; and A.'s estate ought not to be implicated in a litigation regarding the private and separate affairs of the person who happens to be his executor.

So a demand, in which all the plaintiffs jointly have an interest, cannot be united with a demand in which only one of them has an interest.

Making a party defendant unnecessarily.

A suit is multifarious when a party is named as defendant in a plaint, with a large portion of which he has no connection whatever; whereby he may be put to useless expense.

Vendor *vs.* purchasers of several lots.

If an estate be sold in lots to different purchasers, the vendor cannot sue in one action the purchasers of different lots, for the circumstances of each sale may be distinct from the others, and it is unfair to call upon a defendant to answer a plaint containing several distinct matters, relating to individuals with whom he has no concern.

Suit to administer estate of A. and to set aside sale of part of it to B.

A plaint ought not to be filed for the double purpose of administering a testator's estate, and of setting aside a sale made of a part of it by the executor to A., a stranger. The defendant A., the purchaser, has nothing to do with the general administration of the estate. His case is perfectly distinct, and he has a right to have that case discussed and decided by itself.

If, indeed, the plaint alleges that the executor, in the first instance, corruptly purchased the estate from himself, and that the defendant A. bought from him what he had so corruptly

purchased, then A. is properly joined in the suit, because if the purchase by the executor is set aside, his sale to A. must also be reversed.

A demand against all the defendants jointly, cannot be united with a demand against only one of them.

Suit against the defendants jointly and one of them severally.

As, for instance, if the plaintiff, jointly with A., made a shipment of sugar to England and also jointly with A. and B. made a shipment of opium to China, and he seeks in one suit his share of the profits of both adventures; this is in truth a demand which the defendants are jointly interested in resisting coupled with a demand which only one of them is interested in resisting, and the suit is multifarious with respect to B. who is exposed to useless trouble and expense by being compelled to take part in an investigation of a transaction to which he was a total stranger. Nor can the joint demand be properly united with the separate demand, even where both are founded upon one deed of agreement, as where A. and B. made an agreement with the plaintiff, and after a time A. put an end to the agreement, but B. continued to deal with the plaintiff on the footing of the agreement. A. and B. must be sued jointly in respect of any obligations contracted by them before. A. put an end to the agreement, and B. must be sued alone in respect of his subsequent dealings with the plaintiff.(*x*)

Where different properties may be united in the same suit.

Where all of the plaintiffs are interested in the matter in dispute, and all the defendants are interested, though perhaps not equally interested, in the different questions raised in the cause, and those questions relate to one common object, there the objection for multifariousness does not apply.

Of this class are some of the cases mentioned above.

If the object of the suit be single, but different persons have separate interests in distinct questions which arise out of that single object, those persons must be brought before the Court in order that the suit may conclude the whole subject. The object of the plaintiffs or the case as to one defendant, may be

(*x*) S. D. 1849, June 19th, p. 211.

so entire as to be incapable of being prosecuted in several suits, and yet another defendant may be a necessary party to some portion only of the case stated by the plaint.

The nature of the objection of multifariousness.

Misjoinder.

Multifariousness.

The objection of multifariousness or misjoinder then, is a question of discretion, to be determined with reference to the circumstances of each particular case. The things chiefly to be avoided are, the mixing up dissimilar subjects of litigation, between the same parties, and the bringing and keeping before the Court, without necessity, as defendants, persons who have no interest in a great part of the matters to which the suit relates.

Where matter is incapable of being dealt with separately.

If a father has executed three deeds, all vesting property in the same trustees, and upon similar trusts, for the benefit of his children, the administration of the trusts created by the three deeds may be embraced in one suit.

And although the trustees of the three deeds should be different persons, the administration of the trusts may still be made the subject of one suit; for the whole property being devoted to one purpose, the trusts of the three deeds cannot be administered irrespectively of each other.

Property claimed under separate deeds must be separately sued for: but a claimant may sue in the same action any number of persons who are infringing his rights as to the same property, as for instance any number of decree-holders, attaching the same land;(*y*) and where one general right is claimed by the plaint, the suit is not multifarious, although the defendants have separate and distinct interests.

Thus a person claiming some general rights as a zemindar may file a plaint against a number of persons claiming particular rights inconsistent with his general right: or if there are questions between him and the occupiers as to the land held, and the rent payable by each, he may file one plaint against them all for the ascertainment of the boundaries of their lands.(*z*)

(*y*) R S. C. 31st January, 1842, p. 23.

(*z*) Supra p.

And so where several persons claim under one general right, such as a right of common, or of irrigation, they may sue together for the establishment of that right, although they may not all be interested to an equal extent in the enjoyment of the right.

Validity of plaint not affected by number of issues in defence.

It has been held that where the cause of action is single and directly affects the property in dispute, as when lands have been conveyed to the plaintiff by one deed of sale, a suit for possession is not multifarious although the defendants may set up separate defences, each claiming a distinct portion of the lands, and each claiming under a separate conveyance to himself.(*a*)

A plaint may have an appearance of doubleness, when it prays, not only for possession, but that the transactions upon which the defendants are supposed to found their title may be set aside; but the latter prayer is merely subsidiary to, and, in fact, forms part of the former, because possession cannot be given without first removing the existing impediments.

(*a*) S. D. 1846, 18th March, p. 108; Sel. Rep. 15th July, 1847, v. 7, p. 354; S. D. 1848, 29th July, p. 727. Ibid, 1848, 16th August, p. 769.

CHAPTER XI.

PARTIES TO SUITS.

A man's rights not to be decided in his absence.

IT is a principle of all fair juridical procedure, that no man's rights shall be adjudicated upon, except in his presence. Accordingly, the decree which the Civil Court may pronounce in any suit, is only binding upon the persons who are named upon the record as parties complainant or defendant, and upon those who derive their rights through or under such parties.(*b*)

Who are bound by decree.

Decree ought to declare the rights of all parties.

The decree ought, if possible, to provide for and settle the rights of all persons who are interested in the questions decided; so that those who are to obey it may be secured against molestation, and that there may be no further litigation on the subject.

All persons directly affected by decree should be parties.

For these reasons, all those persons ought to be made parties to a suit either as plaintiffs or as defendants, whose interest in the subject matter of the suit is such as may be affected by the decree which shall be pronounced.

Thus if land has been given to B. for his life, and after his death, to A., where a third person claims the land as being absolutely his own in perpetuity, both A. and B. must be made parties to the suit, because the interests of both will be adjudicated upon by the decree.

But not all interested in the subject matter.

A person may be interested in the property to which the suit relates, and yet his interest may be such as cannot be affected by the decree. As, if land be so settled that it will undoubtedly belong to A. at the death of B., but there is a suit between B. and C. as to the possession of the land during the life of B. only: A. is interested in the land which forms the subject matter of the suit, but he is not interested in that which

(*b*) Sel. Rep. 30th June, 1812, v. 2, p. 19; R. S. C. 15th March, 1842, v. 2. p 5.

is demanded by the plaint, and his interest cannot be affected by the decree. A. therefore need not be a party to such a suit.

But all those persons must be parties, against whom a decree may be made, or against whom relief may be prayed, or who have an interest in the subject of the suit, which interest must be bound by the decree; all persons from whom a benefit may be obtained, or upon whom a duty may be imposed, by the suit; in short, all persons concerned in the object, as well as in the subject matter of the suit.

The plaintiff ought to name, as parties, all persons who by his own statement appear to have such interests as have been mentioned. If there be other persons similarly interested, whose interests he does not set forth, and whom he does not make parties to the suit, he runs the risk of obtaining, even if successful, a decree which will be ineffectual as against some of those whom it is his object to bind: and he exposes himself to all the objections which the defendants may raise to the progress of the suit, upon the ground that it is imperfectly constituted by reason of the omission of necessary parties.

Consequences of not naming all necessary parties.

If the circumstances of the case are such, that the plaintiff will be satisfied with a decree against the defendant whom he is actually suing, he need not make any third person a party, although such third person claims for himself the property in dispute; because if the plaintiff proves his case against the defendant whom he does sue, he will be entitled to a decree against that defendant; and if he fails to prove his case, his plaint is dismissed, but nothing is decided by such dismissal except as against the plaintiff; and therefore the absent claimants cannot be wronged.(c)

Where adverse claimants need not be parties.

Thus A., claiming as heir of B., brings an action against C. for the possession of land which C. asserts that he bought

(c) Sel. Rep. 30th December, 1816, v. 2, p. 219. Ibid, 5th April, 1816, p. 178. Ibid, 2nd March, 1825, v. 4, p. 38. Ibid, 27th May, 1841, v. 7, p. 33. S. D. 1848, April 26th, p. 368.

from B. Whether A. or C. be successful in this suit, D. may still sue for the estate, on the ground that it has always belonged to himself, and that B. had no right to it.

The other persons interested in the objects of the suit, may have claims either wholly or partially concurrent with those of the plaintiff, or wholly adverse: and where they are adverse, their interest in resisting his demand may be direct, or it may be merely consequential.

Parties whose claims are wholly or partly concurrent with those of plaintiff.

Thus, where one of several joint owners sues a stranger for possession, the rights of the co-sharers are in entire accordance with those of the party suing.(*d*)

Where several persons agree with the plaintiff in asserting that the property in question belonged to A. deceased, and that it was wrongfully taken possession of by the defendant B., and that A. disposed of it by will; but they put different constructions upon the will, each insisting that under it the property belongs to himself; or where they agree that A. died intestate, but each of them alleges that he is himself the heir and representative of A.; here the claims of those persons are so far concurrent with those of the plaintiff, that they rest as against B., upon facts to be substantiated by the same body of evidence; but they are at variance with the plaintiff and with each other as to all the rest of the case.

Parties immediately interested in resisting.

If, on the other hand, an individual is in the possession or enjoyment of the property sued for, or has any interest in it, which is likely to be defeated or diminished by the enforcement of the plaintiff's claim, such person has an immediate interest in resisting the demand.

Parties consequentially interested in resisting.

If the success of the plaintiff against the defendant who is immediately interested, may give to that defendant a right to demand compensation from a third person for the loss sustained, such third person, as being liable to be affected consequentially by the result of the suit, is also a necessary party to

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(*d*) Sel. Rep. 9th March, 1848, v. 7, p. 462, 29th July, 1834, v. 5, p. 358. Ibid' 30th December, 1844, v. 7, p. 187.

it, and ought to be brought before the Court in the first instance, in order that the relief which the defendant is entitled to against him, in the event of the plaintiff's success, may be awarded by the same decree.

Persons whose interests are concurrent with those of the palintiff, yet who do not choose to join in the action, ought to be made defendants, as ought also, of course, those whose interests are in any degree adverse to the plaintiff.(*e*)

Suits for lands under a will.

In suits to obtain possession of immovable property by virtue of a deed or will, all persons who claim an interest in such property under the instrument in question ought to be parties, as well as those who hold possession adversely to them: and where the person having the apparent legal right to demand that which it is the object of the suit to obtain, is not the plaintiff, but is alleged to be a trustee for the plaintiff, such person ought to be a party to the suit, for if he were not, he might in his turn claim some right in his own person.

Where the apparent right is in a trustee.

Thus, if A. sues B. to set aside the sale to B., of lands which were held in the name of C., but which A. alleges to have been so held in trust for himself, C. must be a party to the suit.(*f*)

Where one person contracts as agent for another.

But where one person contracts as agent for the benefit of another, the person for whose benefit the contract was made may claim performance of it without making the agent a party, if he can shew, by the terms of the contract, that the person making the contract was merely his agent.

Where the agent must be a party.

If, however, this cannot be shewn, he must make the agent a party, either as co-plaintiff or as defendant, because otherwise the agent might himself claim performance of the contract.(*g*)

Where the principal must be a party.

Where a contract is entered into by an agent, in his own name, but really on behalf of other persons, and a suit is

(*e*) Sel. Rep. 29th July, 1834, v. 5, p. 358.

(*f*) Sel. Rep. 3rd May, 1812, v. 7, p. 95; 6th April, 1848, p. 481.

(*g*) See Sel. Rep. 19th September, 1836, v. 6, p. 108, v. 7, p. 482.

instituted respecting that contract, those persons who are interested in the contract must be parties to the record.

Suits for account.

If an account is sought against a defendant, all persons who are interested in having the account taken, or in the fund which shall appear to be due on taking the account, ought to be parties, for otherwise the defendant may be subjected to as many suits as there are persons interested.(*h*)

Exception where interests of absent parties not affected.

Where it appears that some of the persons who were interested in the account sought for, have been accounted with and paid, such persons need not be made parties to the suit, as where a definite portion of an ascertained sum is sought from trustees.

Suits for redemption or foreclosure.

In a suit for foreclosure or redemption of mortgaged land, all the parties entitled to the mortgage money ought to be before the Court.

A decree of foreclosure obtained in a suit by A. against B. will be no defence for A., in a suit for redemption by a third person who was not a party to the former suit, and who claims by a higher title than B.(*i*)

Suits for partition.

Where a suit is instituted for a partition, all persons interested, and whose possession is to be altered by the decree, ought to be parties.

Suits for reversal of orders made by Criminal Courts under Regulation XV., 1824.

In a suit for the reversal of orders passed by the Criminal Courts under the provisions of Regulation XV., 1824, all the parties to the proceedings in the Criminal Courts, or those upon whom the interests of such parties may have devolved, must be made parties.(*j*)

Two of three joint lessees.

If three persons be joint lessees, two of them cannot sue in respect of rights claimed under the lease, without making the third a party.

To suit by lessee, lessor must be party.

And if a lessee sues to establish some right as belonging to his tenure (as a right of way over the land of a neighbour) the lessor ought to be a party, otherwise he might sue the defendant anew, though the suit were determined against

(*h*) See Baboo Janokey Doss *v.* Bindabun Doss, 3 Moo. Ind. Ca. p. 175.

(*i*) Sel. Rep 6th October, 1841, v. 7, p. 52. Supra, p 43.

(*j*) S D 1848, 29th June, p 615.

the lessee. So if the lessee is sued, the lessor, if not a party, is not bound by the decision.(*k*)

Where lessor should be a defendant in suit by lessee for possession.

It has been held that where a lessee brings a suit for possession under his lease, against a party who puts him or keeps him out of possession on the ground that the lessor had no right to grant the lease, the lessor must be made defendant: for his title is brought into question, and the lessee, if unsuccessful, would have consequential relief against him on account of the invalidity of the lease:(*l*) and also that if one man sells to another land which is not in his possession, and if the person in possession resists the claim of the purchaser on the ground that the vendor had no title to sell, the vendor must be a party to a suit by the purchaser for possession, for the vendor's title is the principal question in the suit.(*m*)

Tenants not parties to suit for proprietary right.

Tenants who occupy land on lease, or other persons claiming under the possession of a party, whose title to real property is disputed, are not in general deemed necessary parties, unless their derivative rights happen to be of great value; although those rights cannot be bound by decision in a suit to which they are not parties.

Where lessee to be a party to suit for possession.

Where one man sells to another certain land which a third party holds in putnee under the vendor, in a suit against the vendor to obtain possession, the putneedar is properly made a defendant, as the possession is to be obtained through him.(*n*)

Where purchaser is sued for rent due before purchase.

If the purchaser of an estate subject to rent, be sued for rent which is alleged to have partly accrued due before his purchase, the proprietors who were in possession during the period in question, ought to be made defendants along with him.(*o*)

Where zemindar must be a party.

There can be no enquiry into, or judgment upon, an alleged lakhiraj tenure, in the absence of the zemindar or malguzardar, whose rights are involved in the determination of the ques-

(*k*) Sel. Rep. 7th February, 1817, v. 2, p. 223.

(*l*) S. D. 1846, 15th September, p. 359; Sel. Rep. 3rd May, 1842, v. 7, p 95; S. D. 1849, 21st June, p. 246.

(*m*) S. D. 1848, 26th January, p. 31.

(*n*) S. D. 1845, 17th June, p. 194.

(*o*) S. D. 1847, 11th September, p. 536.

Where question as to lakhiraj tenure.

tion, and therefore he ought to be made a party in all suits in which it is a question whether the tenure be lakhiraj or not.

Thus where (p) the plaintiffs sued for land, as land liable to revenue, under pottahs or leases granted to them by the farmers, and the defendant urged his right to hold it without payment of revenue under a lakhiraj sunnud or grant from the zemindar, it was held that there could be no enquiry into the merits of the grant in the absence of the zemindar.

Suit against estate of infant.

In a suit for money due from an infant's estate, the person in charge of the property ought to be a party.

Suit for inheritance on relinquishment of heirs.

A person who claims an estate as his inheritance, upon the ground that it has devolved upon himself through its relinquishment by a nearer heir, ought to name that nearer heir as a defendant.(q)

Assignor must be party to suit by assignee.

If a man assigns any security for money or any valuable engagement which has been granted to or contracted with himself, it seems to be a rule of practice that he must be a party to any suit which the assignee may bring to give effect to the security or engagement.(r) But if this be so, he ought to be a defendant and not a co-plantiff; and even if he has not been originally named as a party, the defect will be cured if he presents a petition in the cause, recognizing the assignment.(s)

Parties must be properly arrayed.

It is not merely necessary that all proper parties should be before the Court, but they must be so arrayed that every facility shall be given for the investigation of their claims,(t)

Plaintiffs are the conductors of the suit.

for the plaintiffs are practically the actors in the suit, and it is a mistake for persons to join as plaintiffs who cannot act in concurrence throughout.

If two persons join in a suit for land or other property, one claiming under the will of A. deceased, and the other claiming as heir of A. not under any will, but by the general rules of law, they may together say, with some show of

(p) Sel. Rep. 15th July, 1847, v. 7, p. 353. See S. D. 1847, 20th May, p. 164. S. D, 1848, 15th May, p. 451.

(q) S. D. 1849, 14th June, p. 204.

(r) S. D. 1848, 17th February, p. 94.

(s) Infra, p. 432.

(t) Supra, p 45.

reason, that it does not signify to the defendant, whether the property belongs to the devisee or to the heir: that it belongs to one or the other, and that the defendant ought not to retain the property, unless he can shew a preferable right to those who represent the interest vested in one or other of those parties.

But this manner of suing is inconsistent with the sound conduct of forensic controversy: the defendant has a right to know by whom he is to be compelled to yield up the property; he can only be so compelled by a person having a better title than himself, and he has a right to avail himself of any infirmity in the title of the party suing him; he is entitled, therefore, to ask whether he is to contest the question with the heir or with the devisee.

If the estate be passed by the will, one has nothing to do with it: if it did not pass by the will, the other has nothing to do with it.

Both the plaintiffs cannot be entitled to the property, one of them must be entitled to the exclusion of the other; the Court by its decree must say which is entitled, and must order the defendant to give it to the person entitled. The Court must therefore decide between the claims of the co-plaintiffs before they can decide between the co-plaintiffs and the defendant. But this is impossible, for parties between whom any question is to be decided, must be arrayed on opposite sides, in order that the question between them may be raised and decided according to the common rules of pleading.

So, where the plaint filed by A. and B. against C. states that A. being absolutely entitled to a sum of money, has assigned it to B., by a complete assignment, which wants nothing to make it perfect, not even leaving to the assignor a nominal interest, as trustee for the assignee; here are two parties, one of whom cannot have any interest in the subject matter of the suit; but both concur for the purpose of pre-

venting the defendant from alleging an infirmity in the title of either. A party having no interest cannot join with a party who has an interest; if they are co-plaintiffs, they must join in the prayer, but the prayer cannot be right as to both: for it is absurd that one person having a good title and another having none, should join in a prayer that the property may be conveyed to them; or if the prayer be that it be conveyed to one of the two, then the other by joining in it shews that he is a mere stranger and has no title to be heard in the suit.

Two plaintiffs cannot be put to interplead; if the decision be in favour of either, it must be a decision passed without hearing what the other has to say against it: if the Court decides that one of the plaintiffs is entitled, and the defendants do not complain, the other plaintiff has no means of appealing against the decree obtained by himself.

It is therefore impossible to make a decree at the suit of A. and B. which is to destroy the right of A. and give the right to B., or to give the right to A. and destroy the right of B., and the Court cannot give joint relief to both the plaintiffs, or separate relief to either.

It may be said indeed that the consent of the co-plaintiffs prevents any wrong being done to them. But wrong is done to the defendant; for where persons having conflicting interests, or parties, one of whom has an interest and one has no interest, are thus joined, it prevents the defendant from making two distinct defences. Or if he does make two distinct defences, with distinct evidence in support of each, this is in reality carrying on two lawsuits in one.

Plaintiffs whose claims are distinct from each other.

Where the plaintiffs claim things wholly distinct from one another, as if in the same suit A. claims the land only, and B. only the mesne profits, this amounts to a misjoinder of parties.

Persons not interested.

A person not interested need not in general be made a defendant.

Arbitrators.

If a plaint be filed either to enforce or to impeach an award the arbitrators ought not to be made defendants, for the plaintiff can obtain no decree against them.

Where Collector must be a party.

But a Collector may represent important interests, and is frequently a necessary party.

Suit for malikana.

Where an action is brought against the mokurrereedar of land to recover malikana, and the right of the plaintiff to claim as malik is disputed, the Collector ought to be made a defendant, that the right to malikana may be contested with him.(*u*)

Suit to set aside a revenue sale.

Land taken by his order.

He ought also to be made a party to a suit brought to set aside a revenue sale of land,(*v*) or to obtain possession of land which is alleged to have been wrongfully taken from the plaintiff by an act of the Collector.(*w*)

Not to suit to contest decision under Regulation VII., 1822.

A regular suit to contest the decision of a Collector under the powers vested in him by Sections 11, 12, 14, 15, 16, 17, 18, 19 and 20 of Regulation VII., 1822, is in the nature of an appeal from a summary award, and it is not necessary that the Collector, or any other officer of Government, should be a party to such a suit.(*x*)

In an action for the recovery of property, attached by an ameen appointed by the Collector under instructions from the Civil Court, the Collector ought not to be made a party.(*y*)

Where zemindar must be a party. Suit to reverse sale, under Regulation VIII., 1819.

No sale under Regulation VIII., 1819, can be reversed, unless the purchaser and also the zemindar at whose instance the sale took place, are parties.(*z*)

Suit for proprietary right.

The proprietary right to land cannot be tried in the form of an action against the tenant for the value of the crop. If the right to the crop be incident to the proprietary right, the zemindar must be a party.(*a*)

(*u*) Reg. VIII., 1793, Sec. 44; S. D. 1846, p. 93.

(*v*) Sel. Rep. 29th July, 1834, v. 5, p. 358.

(*w*) Sel. Rep. 18th Nov. 1830, v. 5, p. 72.

(*x*) Reg. VII., 1822, Sec. 23, Cl. 2.

(*y*) R. S. C. 5th February, 1835, p. 6.

(*z*) S. D. 1845, p. 412.

(*a*) S. D. 1846, p. 328; 1849, 21st June, p. 246.

If a man lets land to another, and the lessee is ousted by a third party claiming the land under a lease from a different zemindar, it is held that he may sue such third party for redress, making his own lessor a defendant, without making the zemindar of the dispossessing party a defendant.(*b*)

Where lessor need not be party in suit by lessee.

When a man holding dewutter lands from A. is forcibly compelled by B. to give him a cabooleut, or attornment, in respect of the same lands, the tenant may sue B. to set aside the cabooleut without making A. a party; for the wrong was done exclusively between B. and the tenant.(*c*)

Claim on joint and several liability.

Where a debt is joint and several, the plaintiff must bring each of the debtors before the Court, because they are entitled to the assistance of each other in taking the account, and because debtors are entitled to a contribution among themselves when one pays more than his share of the debt.

But where the obligor who is sued is the principal, and the other obligors are only sureties, the latter need not be sued.(*d*)

Principal insolvent.

If the principal is clearly insolvent, and can be proved to be so (as by his having subsequently to the contract taken advantage of the insolvent rules of the Civil Courts, or of the Act for the relief of insolvent debtors in Calcutta,)(*e*) he need not be a party to the suit, unless the plaintiff thinks fit.

Executors of co-surety.

In a suit by one surety against another to make him contribute, the executor of a deceased co-surety ought to be a party.

Effect of joint debtor's discharge under Insolvent Act.

If several persons be jointly indebted to a third party, and one of them takes the benefit of the Act for the relief of insolvent debtors in Calcutta; although he cannot be sued, the others may be sued without him.(*f*)

Effect of judgment of Supreme Court

When A., B. and C. are jointly indebted to D., and D. obtains judgment in the Supreme Court against A. (who alone

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(*b*) S. D. 1847, 3rd May, p. 123.

(*c*) S. D. 1847, 3rd August, p. 393.

(*d*) See Sel. Rep. 28th May, 1827, v. 4, p. 238.

N. B.—The marginal note states propositions which are not borne out by the report. The decision really rests upon the ground that the execution of the alleged surety deed had not been proved.

(*e*) Infra Chap. XXXI.; 10 and 11 Vict. Chap. XXI.

(*f*) Sel. Rep. 14th January, 1841, v. 7, p. 1. Ibid, 8th April, 1841, p. 25.

is subject to the jurisdiction of that Court) and so recovers a portion of the debt; A., B. and C. may still be sued in the Civil Court for so much of the debt as remains unpaid.(*g*)

against joint debtor.

Whenever more than one person is liable to contribute to the satisfaction of the plaintiff's claim, they should all be made parties to the suit: as if there be a demand against a partnership, all the partners must be before the Court, and if any of the partners liable to the demand are dead, their representatives ought to be parties.

Claim against partnership.

Even though the demand be against several persons jointly, yet the Court may entertain a suit against some of them for the whole, where the others are abroad.

Claim on joint liability when some debtors are abroad.

Persons may be co-plaintiffs, whose titles, though distinct, are not inconsistent with each other; thus, all the joint owners of an estate which has been erroneously sold for arrears of revenue may sue to set aside the sale; the creditors of a deceased debtor may join in a suit to cause his estate to be administered according to law and applied to the discharge of their claims; or, for the sake of convenience, one joint owner or creditor may file a plaint on behalf of himself and all the others; and the others, if they choose to avail themselves of his act, will, without becoming parties on the record, obtain equal advantages with the actual plaintiff.(*h*)

Where claims distinct but consistent.

One suing on behalf of a class.

It sometimes happens, especially in the case of trading partnerships, that the persons who are interested in the objects of the suit, and who, according to the general rules of law, ought to be parties, are so numerous as to render it incovenient or impracticable that they should all be parties to the record.

In such cases, if they have all one common interest, a few may sue on behalf of themselves and all the other members of the association or body; thus, where all the inhabitants of a village have rights of common or other general rights, one may sue for all.

(*g*) Supra p. 48.

(*h*) Sel. Rep. 29th July, 1834, v. 5, p. 358. Ibid, 30th December, 1844, v. 7, p. 187.

Only where object of suit beneficial to all.

It must, however, be clear that the object of the suit is beneficial to all parties whom the plaintiffs undertake to represent: and in such case a few may sue on behalf of themselves and others, even though the majority disapprove of the institution of the suit: as where the plaint seeks to obtain a direct advantage for all, or to impeach a contract manifestly injurious to the whole, or where it is filed by a legatee or creditor of a person deceased, praying on behalf of himself and of all the other legatees and creditors, that the executor may render an account of the estate and may satisfy their claims.

But if it be in any degree uncertain whether it will be advantageous to all that the Court should make the decree which is prayed for in the suit, the suit cannot be maintained by one on behalf of all. One partner cannot file a plaint on behalf of himself and other partners for a dissolution of the partnership, because it cannot be known, before the case has been investigated, whether a dissolution would or would not be advantageous to all.

Cultivating ryot not ousted without concurrence of all sharers.

Where land forms part of a joint and undivided estate, one or more of the co-sharers cannot, without the consent of the others, obtain possession as against a cultivating ryot, even by suing him, and naming as defendants, those of the co-sharers who refuse to join in the plaint. A decree for a fractional portion of the ryot's holding in such an estate, cannot be executed without the consent of all the sharers; each sharer is entitled to his portion of each beegah of land, and if the co-sharers at large do not wish to disturb the ryot's possession, the plaintiffs cannot do so.(*i*)

But although the Court will not interfere in the internal management of an estate, yet if a joint owner finds his co-sharers persisting in a course of management which he deems injurious to the common interests, he may sue them for a partition.

(*i*) S. D. 1847, 11th September, p. 536.

One of several owners may, without the concurrence of the others, sue a stranger for possession of the joint property, on behalf of the co-partners generally, if the stranger professes to hold under an adverse title.(*j*) The Court will take care, by its decree, to provide for the safe keeping of the property which may be eventually adjudged to the plaintiff, until all who claim to be interested jointly with him have had an opportunity of asserting their rights.(*k*)

Those who seek relief in this form, must be persons who all have one common interest in all the objects of the suit, such as creditors who are entitled to satisfaction of their demand out of one estate, or members of a joint adventure or partnership, who are entitled in common to aliquot shares of one property.

A. on behalf of A. and others, against B.

In order that all proper parties may be before the Court by representation if they are not personally before it, the plaintiff must sue on behalf of all who are interested, except the defendants.

On the other hand it may happen, that the parties who according to general rules ought to be defendants in a suit, are so numerous that they cannot conveniently be named as defendants.

A. against B. on behalf of B. and others.

In such a case the suit may be brought against certain persons on behalf of others as well as themselves. The persons thus sued ought to be such, in character and in number, that it may be justly expected that they will fairly and honestly try the legal right between themselves and other persons interested upon the one hand, and the plaintiff upon the other hand.

Where all the defendants have but one right amongst them, founded upon the same circumstances, it is enough to sue a few of them, as where a great number of occupiers of land are liable for the whole rent and for each other.

(*j*) Sel. Rep. 30th December, 1844, v. 7, p. 187.

(*k*) S. D. 1849, October 29th, p. 400.

But where there are several different rights under which the claim of the plaintiff may be resisted, there must be a corresponding number of defendants on the record, who may maintain all the several defences.

If fifty persons fish in A.'s lake, all claiming a right to do so as lessees of B. it is enough to make one or two of them defendants; but if forty of them claim under B. and ten claim under C., then one of each class should be named as a defendant.

A. on behalf of A. and others, against B. on behalf of B. and others.

Sometimes it is necessary for the plaintiffs to bring their suit on behalf of themselves and others, against the defendants on behalf of themselves and others.

Classes of members of associations.

The number of shareholders in joint stock companies, whether enjoying corporate privileges or not, is frequently so great, that if disputes arise among them concerning the affairs of the company, those who desire to enforce their claims through the instrumentality of the Court could not all join as plaintiffs, without extreme inconvenience. The evil would be still greater if each shareholder should file a separate plaint to recover his portion of the property in dispute. The Court will therefore endeavour to do justice to all in one suit; and for this reason, where individual members of a company, wish to sue the directors or others who are also members of the company, and where they cannot persuade the company itself (if a corporation) to institute a suit; they may bring such a suit in their own names, either suing by themselves and making the rest of the company defendants, or suing on behalf of themselves and the other members of the association who may come in and contribute to the expense of the suit.

Interest of represented and representative must be the same.

But such suits are governed by the principles already stated. The relief which is prayed must be one in which the parties whom the plaintiffs profess to represent, have all of them an interest identical with that of the plaintiffs; for a man cannot be represented by an hostile party.

If the decree which is asked for may possibly be injurious to any members of the society, those parties ought all in strictness to be made defendants, because each of them may have a reply to give, adverse to the interest of the parties suing. But the Courts of this country would probably not hesitate to pronounce a decree, binding, after due notice to appear, the interests of all classes of persons who may be properly represented; that is to say, of all persons whose interests are identical or nearly identical with the interests of some one who has appeared in the suit, and has brought to the knowledge of the Court the ground upon which his claims rest.

CHAPTER XII.

HOW A SUIT IS TO BE BROUGHT.

Complainant must sue in his own name.

Person not interested cannot sue.

By whom plaint must be filed.

A SUIT is instituted by presenting a petition of complaint, which must run in the name of the real complainant,(*l*) and not in the name of an imaginary person, or of a real person not interested.(*m*)

The petition of complaint ought ordinarily to be presented to the Court within whose cognizance the suit properly falls,(*n*) by the party complaining or by a Vakeel duly empowered by him, being an authorized pleader of the Court.(*o*)

It would seem, however, that in those cases which, from some special cause, the subordinate Judge is disabled to entertain,(*p*) the petition of complainant may be presented in the Court of the Zillah Judge; who will deal with it according to the rules stated below.(*q*)

If a plaint or answer or any other proceeding be filed in the cause, otherwise than by the party in person or by his Vakeel, it is treated as a nullity.(*r*)

A Vakeel must be empowered by a vakalutnamah executed by the party employing him, or by the authorized agent of such party.(*s*)

A person desiring to appoint an agent or Mookhtar to act for him in such matters generally, or in one suit in particular, peti-

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(*l*) Cir. Ord. 29th July, 1809.

(*m*) Sel. Rep. 22nd July, 1833, v. 5, p. 314. See S. D. 1850, January 29th, p. 6.

(*n*) Infra, Chap. XV.

(*o*) Reg. IV., 1793, Sec. 2; Act IX., 1844; Act I., 1846.

(*p*) Infra, Chap. XV.

(*q*) Ibid.

(*r*) S. D. 1849, 28th March, p. 79.

(*s*) Con. 417, 28th April, 1826.

tions the Court for leave to do so; and if his application is sustained, (which it generally is, unless the proposed agent is known to have been guilty of gross misconduct,) the agent is considered as authorized to act for him accordingly.(*t*)

Gomashtah may sue in name of banking firm.

The managing Gomashtah of a banking house may, under the general and known powers vested in him, institute suits connected with the kootee or firm of which he is the ostensible representative, without producing any authority from his principal for so doing.(*u*)

Effect of vakalutnamah.

By the vakalutnamah, the Vakeel is constituted pleader in the cause, and is authorized to prosecute it, and the complainant is bound to abide by and to confirm all acts which the pleader may do or undertake on his behalf in the cause, in the same manner as if he had been personally present and consenting.(*v*) The party who grants this power must "attest the instrument by affixing his seal or signature, or his mark if he cannot write, in the presence of two credible witnesses, who are to attest it in the same manner, and who are to attend the Court and prove the vakalutnamah in all cases in which it may be judged requisite."(*w*)

How executed.

Vakalutnamahs, whether executed by principals or by their attorneys and agents, and mooktarnamahs, or powers of attorney, under the authority of which vakalutnamahs are executed, are not required to be verified on oath. The responsibility in regard to all such documents being properly and correctly executed rests entirely with the Vakeels.(*x*)

Need not be verified.

Stamp.

The vakalutnamah(*y*) must, in all Courts, except that of the Moonsiff,(*z*) be written on stamped paper; but it is not liable to the stamp duty imposed on exhibits. In the Moonsiff's Court it may be written upon unstamped paper.(*a*) Two or more Vakeels may be appointed by one vakalutnamah.

(*t*) Con. 809, Cal. C. 2nd August, West. C. 6th September, 1833.

(*u*) Con. 75, 31st January, 1811.

(*v*) R. S. C. 22nd March, 1842, p. 26.

(*w*) Reg. XXVII., 1814, Sec. 21, Cl. 1.

(*x*) Cir. Ord. 15th September, 1843.

(*y*) Reg. X., 1829. See Reg. I., 1814, Secs. 15 and 18.

(*z*) Con. 950, Cal. C. 1st May, West. C. 10th July, 1835.

(*a*) Con. 798, Cal. C. 14th June, West. C. 19th July 1833.

Acceptance by the Vakeel.

When a Vakeel to whom a vakalutnamah may have been given, consents to undertake the prosecution of the suit, he affixes his signature to the back of the vakalutnamah, together with the date of signing, and he is thenceforth precluded from being employed in the same cause against the party who has so retained him.(*b*)

Agreement for remuneration of the pleaders.

Parties employing pleaders are at liberty,(*c*) whatever may be the Court they sue in, and whether they sue as paupers or otherwise,(*d*) to settle with them by private agreement the remuneration to be paid for their professional services; and it is not necessary to specify such agreement in the vakalutnamah: such agreements, however, can only be enforced by a regular suit.(*e*)

The rules for determining the amount of pleaders' fees where the opposite party is decreed to pay them, will be stated below.(*f*)

The personal appearance and acknowledgment of the party executing a mooktarnamah are unnecessary: it is enough that the execution of the document be proved by two credible witnesses.(*g*)

Mooktarnamahs do not require registration. They are attested without fee or gratuity by the uncovenanted Judges of every class, who affix their official seals and their signatures.(*h*)

If the power be a general power, to act in more than one Court, the original is given back to the party presenting it for attestation, and a copy on plain paper is retained in Court in lieu of it.(*i*)

Mooktarnamahs filed in the Courts of Moonsiffs, are not liable to stamp duty.(*j*)

(*b*) Reg. XXVII., 1814, Sec. 22.

(*c*) Act I., 1846, Cl. 7.

(*d*) Con. 1297, Cal. C. 28th May, West. C. 18th June, 1841.

(*e*) Act I., 1846, Sec. 8.—N. B. The provisions of this Act do not apply to private agreements between parties and their pleaders, made before the 7th of January, 1846. See *Calcutta Gazette* of 17th April, 1850.

(*f*) Chap. XXVII.

(*g*) Cir. Ord., 8th November, 1844.

(*h*) Ibid.

(*i*) R. S. C. 12th February, 1844, p. 56.

(*j*) Con. 416, 14th April, 1826.

English power of attorney how verified.

A power of attorney executed in England has been held to be sufficiently attested by the affidavits of persons acquainted with the handwriting of the party executing.(*k*)

How Government pleaders are authorized to plead.

No stamp required.

The Government sues by pleaders of its own, who are appointed for that purpose in every Court,(*l*) and the order of a Government Officer, filed by a Government pleader, is sufficient authority to the latter to plead a cause. It is written on plain paper.(*m*)

The Vakeel of Government, on the requisition of the Collector, must plead the cause of an invalid jaghirdar free of cost.(*n*)

The petition of complaint, in whatever Court it may be filed, bears a stamp proportioned to the value of the property sued for.(*o*)

Where more than one stamp is required for engrossing petitions of plaint, the plaintiff may at his option file several stamps, the aggregate value of which will be equal to the amount required by law, or one stamp of the full value, with as much plain paper attached thereto as may be required.(*p*)

A pauper's plaint may be written upon unstamped paper.(*q*)

When a person has obtained permission to sue as a pauper and has furnished the required securities,(*r*) if he can induce any of the Vakeels of the Court in which he intends to sue, to undertake his suit, he may do so, settling privately with the Vakeel as to his remuneration.(*s*) The vakalutnamah must in such case bear the usual stamp.(*t*) If he is unable to prevail upon any of the Vakeels to act for him, and is also unable to plead the cause in person, the Court may require any of its authorized pleaders to undertake and plead the suit.

(*k*) R. S. C. 15th February, 1847, p. 91.

(*l*) See Reg. XXVII., 1814, Reg. XIII., 1829, Cir. Ord. 14th July, 1843, Act I., 1846.

(*m*) R. S. C. 14th July, 1846, p. 81.

(*n*) Reg. I., 1804, Sec. 14.

(*o*) Reg. V., 1831, Sec. 8. Infra Chap. XIV.

(*p*) Cir. Ord. 28th August, 1840.

(*q*) Reg. X., 1829.

(*r*) Supra, p. 11.

(*s*) Con. 1309, West. C. 15th September, Cal. C. 22nd October, 1841.

(*t*) Con. 1132, West. C. 16th February, Cal. C. 9th March, 1838.

The Court states on the record, its reasons for every exercise of this power, and the order of the Court is a sufficient warrant to the Vakeel to plead the suit without filing the usual vakalutnamah.(*u*)

The Court cannot require a Vakeel to receive a vakalutnamah from, or to undertake the suit of any one who is not a pauper.(*v*)

How plaint to be signed.

The petition of complaint must be signed by the complainant if he has no Vakeel, or by his Vakeel, if he has one;(*w*) the signature of the latter is affixed in testimony of his having considered and approved the contents of the petition;(*x*) it is signed and numbered and dated in the order in which it may be received, by the Judge of the Court, and is registered in a book by a Native Officer, but need not be transcribed.(*y*)

Language of the Courts.

The proper language of the Courts, and that in which all their proceedings are recorded, is the Vernacular language of the district in which each Court is situated: that is to say, Oordoo in the North-Western Provinces and Behar, where Oordoo is current; Bengalee in the Bengal districts; and Ooriya in the zillah of Cuttack,(*z*) and in certain pergunnahs adjacent to it.(*a*)

Where pleadings must be accompanied by translations.

In the districts in which either the Oordoo or the Bengalee is the current language, it is laid down that all petitions and pleadings, (including of course the plaint) may be written in any language which the parties think most suitable to their purpose: but any petitions or pleadings which are not written either in Persian, or Oordoo, or Bengalee, must be accompanied by translations in one of these three languages.(*b*)

Where plaintiff must give security for costs.

Every inhabitant of a foreign territory, who may desire to institute a suit, is required to find security for the costs of suit,

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(*u*) Reg. XXVIII., 1814, Sec. 7.
(*v*) R. S. C. 1st August, 1842, p. 35.
(*w*) Reg. IV., 1793, Sec. 3.
(*x*) Reg. XXVII., 1814, Sec. 9, Cl. 1.
(*y*) Act XIV., 1847.
(*z*) Act XXIX., 1837. Cir. Ord. 9th February, 1838.
(*a*) See Reg. XIV., 1805, Sec. 11.
(*b*) Act XXIX., 1837, Cir. Ord. 9th February 1838; 22nd November, 1838; 19th April, 1839; 5th July 1839.

which may eventually be decreed to be paid by him; and he must furnish such security by a surety or sureties, residing and possessing property within the limits of the Company's territory and within the jurisdiction of the Company's Courts. If this be not done within six weeks of the date on which the plaint is filed, his suit is not proceeded with.(*c*)

The circumstance, that a plaintiff resident in a foreign territory, holds lands or other property within the British territories, does not exempt him from the necessity of finding security for costs.(*d*)

Plaintiff going abroad before decree.

Where a person who has instituted a suit, becomes an inhabitant of a foreign territory, before a decree is passed in the suit, the Court of itself requires him to give security for costs immediately upon the circumstance becoming known, even though it should not be moved by any party to make such requisition: and if he fails to give the required security within six weeks after it has been demanded, his suit will not be proceeded with.(*e*)

Paupers.

These regulations do not apply to persons suing as paupers. But as no person except a female of rank can be admitted to sue in that manner, without appearing in Court,(*f*) the exemption would seem to be of little value.

No security taken when co-plaintiffs within the jurisdiction.

The regulation by which these points are determined, does not notice the case of a person resident beyond the jurisdiction of the Courts, suing along with a person who resides within their jurisdiction.

It may perhaps be thought to be in accordance with the spirit of the regulation, to hold, that, in such cases, the co-plaintiff who is abroad need not give security for costs, as the plaintiff who is present may be decreed to pay them.

Where officer abroad on service.

A similar indulgence may be claimed on behalf of one, who being in the service of the Government, and for that reason usually resident in India, happens at the time of his filing the

(*c*) Reg. XIV., 1829, Sec. 2, Cl. 1.

(*d*) Con. 1355, West. C. 5th, Cal. C. 26th August, 1842.

(*e*) Reg. XIV., 1829, Sec. 2, Cls. 1, 2, 3.

(*f*) Supra, p. 7.

plaint to be resident abroad upon the public service. Such a person cannot be considered an "inhabitant" of a foreign territory within the meaning of the regulation.

A visit to a foreign country not sufficient.

And the mere circumstance of a plaintiff's having gone abroad does not seem a sufficient ground on which to compel him to give security, unless it is shewn to the Court that he is gone to settle and reside abroad, so as to become really an inhabitant of a foreign territory.

Where the Court demands security at commencement of suit.

The Court itself is required to demand security, immediately upon its becoming known that a party has become an inhabitant of a foreign territory during the progress of a suit; and there is no reason why this rule should not likewise be considered applicable at the commencement of a suit.

Ambassadors and their servants.

By analogy to the course adopted where the plaintiff is resident out of the jurisdiction, the Court ought to demand security where suits are instituted by ambassadors or by their servants, as these persons are by the law of nations privileged from arrest, and are in this respect upon an equal footing with those who reside beyond the jurisdiction.(*j*)

(*j*) See infra, Chap. XVI., Sec. 4.

CHAPTER XIII.

THE PETITION OF COMPLAINT.

Object of plaint.

THE object of the petition of complaint generally is, to pray the decree of the Court touching some right claimed by the person making the complaint, in opposition to rights claimed by the person against whom the complaint is made.

What ought to be stated in plaint.

Every plaint ought to state precisely the matter of complaint and the value of the thing sued for, the name of the person complained against, and the time when the cause of action arose;—and all material circumstances of time, place, manner, &c. which may elucidate the transaction, and may tend to bring the matter in dispute to a distinct issue.(*k*)

It ought to shew the rights of the complainant, by whom and in what manner he is hindered from enjoying them, or in what he wants the assistance of the Court; and it should pray relief suitable to the case.

Plaintiff's case to be precisely stated.

The case stated ought always to be such, that if the whole statement is proved to be true, the Court will be justified in giving to the plaintiff in whole or in part, the relief or assistance he requires: and therefore whatever is essential to the rights of the plaintiff, and is necessarily within his knowledge, ought to be alleged, positively and with precision.

If the suit be brought for a zemindary, or an independent or a dependent talook, or any landed property, whether lakhiraj or malguzary, (*i. e.*, whether exempt from, or subject to, the payment of revenue to Government) it must state the amount of the annual produce of the land, according to the most accurate

(*k*) Reg. IV., 1793, Sec. 3; Reg. XXIII., 1814, Sec. 17.

estimate which the claimant may be able to procure. By the annual produce of lakhiraj and malguzary lands, is meant the aggregate of the sums that may have been paid, under the regulations, by the dependent talookdars, under-farmers, and ryots, on account of the year in which the claim may be preferred, and that would be payable by them were the claimant to be put into possession of the lands during that year.

If the complaint is for a house, garden, tank, or any real property not being malguzary or lakhiraj land; or any valuable thing, or relating to marriage or caste, or for damages for any injury, it is to state according to the nearest estimate the exact sum of money, or the amount in which the plaintiff may be endamaged.(*l*)

And this specification(*m*) is not only expedient, but absolutely necessary, in order to ascertain the Court in which the suit should be tried, and to obviate the inconveniences which would arise from the trial of suits for portions of the same estate, by different Courts; whereby conflicting decisions on the same issue may be passed by different judges.

Every thing to be proved ought to be stated.

In order that the defendant may be fully informed of the nature of the demand which is made against him, every thing which is intended to be proved ought to be stated upon the face of the plaint, and evidence ought not to be admitted to prove what has not been so stated, for the defendant may thus be overpowered by evidence which he has had no opportunity of meeting.(*n*)

Plaint should shew title in plaintiff.

It would be unjust to compel a man to come before the Court and to defend a suit, upon the application of one who has not, at least, an apparent title to be heard regarding the subject matter of the suit; and therefore every plaint ought to shew that the plaintiff has a right to the thing demanded, or that he has such an interest in the subject matter as entitles

(*l*) Reg. IV., 1793, Sec. 3.

(*m*) See S. D. 1849, p. 238.

(*n*) S. D. 1849, 31st March, p. 89.

him to institute a suit concerning it, and if there be more than one plaintiff, it should appear, not only that they are all interested, but that their respective interests are not inconsistent with each other.(*o*)

If a man sues to enforce any right derived from or through a Hindoo widow, (either by her own assignment or by seizure for her debts) in property which had come to her as representative of her husband, the plaint ought to shew (if the fact be so) that the alienation was made by the widow for some purpose for which she was legally entitled to alienate her husband's estate,(*p*) and a similar statement ought to be inserted in the plaint, where the claim is founded upon the alienation by a guardian, of the property of his ward, or the alienation of joint property by the managing member of a joint family.

Infra.

The interest in respect of which the suit is brought, ought to be an actual existing interest, and not the mere possibility or probability of a future interest; nor ought it to be a precarious interest, of which the plaintiff may be deprived at the will of another.

Not a precarious title.

The plaint ought to shew not only that the plaintiff has an interest in the subject matter, but that he has complied with all the forms that are necessary to enable him to institute a suit concerning it.

Plaint should shew title completed and how.

Thus if he sue as guardian of a Mahomedan minor, not being guardian according to the law and usage of Mahomedans, he ought to shew that he has been especially appointed guardian.(*q*)

If he sue in a representative character, he ought to state that he has proved the will, or has obtained the usual certificate of heirship to the deceased. The mere allegation that the plaintiff's title is complete, is not sufficient, without shewing what has been done to complete it.

(*o*) Supra, p. 96. (*p*) S. D. 1849, October 30th, p. 405.

(*q*) Sel. Rep. 20th September, 1848, v. 7, p. 559. Reg. V., 1799, Sec. 3. Supra, p. 16.

That all preliminaries have been complied with.

A plaint seeking to enforce a right of pre-emption,(r) or a suit to recover possession of mortgaged land,(s) should set forth that all needful preliminaries have been complied with, and how they have been complied with.

And where it is required by law that parties shall apply to the Executive Government for redress before bringing suit, the plaint should allege precisely that this has been done, and should shew how it has been done.(t)

But if property has been forcibly taken,(u) the plaint need not allege that the taker has been criminally prosecuted.

In the case of a mortgage by way of conditional sale,(v) if the debt be not repaid, the lender, unless good and sufficient cause be shewn, has not the choice of suing either for the money or for the property pledged, but is restricted to an action for possession of the property.(w) If, then, the lender sues for the money and not for the property, his plaint ought to set forth the special circumstances under which he conceives himself entitled to depart from the ordinary course.

Plaintiff suing by inheritance must shew pedigree.

A plaintiff, claiming by inheritance, should set forth his pedigree with sufficient precision to shew how he is entitled: for a mere general allegation of hereditary right is not a sufficient ground upon which to put the defendant to the trouble and expense of answering.

Enough to shew title as against the person sued.

But this principle applies only where the title of the plaintiff to relief depends upon the completeness of his hereditary title, and not where, by reason of some transaction between him and the defendant, he has acquired an independent title as against the latter.

Mortgagor v. mortgagee.

Thus a mortgagor in suing his mortgagee, need not carry his title higher than the mortgage, by which both are bound, but it is sufficient to state the execution of that security.

(r) S. D. 1848, pp. 12, 22.

(s) S. D. 1849, September 12th, p. 392.

(t) S. D. 1849, 5th July, p. 274.

(u) S. D. 1848, 15th March, p. 202.

(v) Supra, p. 38.

(w) Con. 898, 5th September, 1834. Sel. Rep. 12th April, 1842, v. 7, p. 92.

And a lessor suing his tenant may rely upon the lease; for the fact of the defendant having accepted a lease from the plaintiff is sufficient to preclude him from disputing the title of the plaintiff to grant it:—or indeed his title to grant leases to others, (all circumstances being similar)(*x*) and one suing his agent whom he has employed to receive the rents of land, need not shew title to the rents, but only that the defendant was employed by him in collecting them.

Lessor *v.* tenant.

Principal *v.* agent.

The real and principal claim of the plaintiff must be distinctly stated, and a decree must be expressly prayed in respect of it: thus, where a man, who has been dispossessed of land, desires to regain possession, and also to recover the value of the produce which has been taken away by his adversary, he must sue expressly for possession, as well as for the value of the produce,(*y*) and must not sue for the value of the produce in the expectation of obtaining indirectly a decree for possession of the land.

The relief sought for must be expressly prayed.

If it appears by the plaint that the cause of action arose upwards of twelve years before the suit was instituted, the plaint ought to set forth distinctly the grounds upon which the plaintiff claims to be exempt from the law of limitation in respect of the matters sued for; whether he relies on his own disability; or on the fact that he has already taken the proceedings necessary to keep alive his right; or on the defendant's acknowledgment of his claims, or on the fraudulent and unjust origin of the defendant's possession.(*z*)

Exemption from bar of limitation should be shewn.

In the latter case the provisions of Regulation II., 1805, must be expressly insisted upon; and it is not enough to make clear and specific allegations of fraud or injustice, unless the benefit of this law is claimed. And even if the fraud or injustice be expressly stated, and the law specially cited, the plaint ought to shew that the suit is brought within twelve

(*x*) S. D. 1849, September 6th, p. 384.

(*y*) S. D. 1849, 21st June, p. 246. Sel. Rep. 19th February, 1848, v. 7, p. 441, and note, and see Supra p. 99.

(*z*) Sel. Rep. 30th September, 1847, v. 7, p. 399. S. D. 1848, 20th December, p. 880. Ibid, 1847, 12th June, p. 245. Reg. II., 1805, Cl. 2.

years from the time when the fraud was discovered, or might with ordinary diligence have been discovered.(a)

Plaint may state case of defendant generally.

It is sufficient for the plaintiff to state the case of the defendant in very general terms, as the latter will have an opportunity of stating it for himself.

Must shew that defendant is liable to be sued.

The plaintiff however must state enough to shew that the defendant is not a mere stranger, but that he is interested, or claims to be interested, in the matters in question in the suit, or that he is in some way liable to be called upon to answer the plaint.

Must shew privity between plaintiff and defendant.

A plaintiff may have an interest in the subject of his suit, and a right to institute a suit concerning it, and yet may have no right to call upon the defendant to answer his demand, although the defendant likewise is interested in the subject of the suit. This is the case where, though each party is interested in the subject of the suit, neither of them has entered into any contract or dealing in respect of it with the other or with those whom he represents: that is, there is no privity between them.

Legatee cannot sue debtors to testator.

Thus a legatee, who has not received his legacy, is interested in the estate of his testator, and has a right to have it called in and duly applied; yet he has no right to institute a suit against the debtors to that estate, for the purpose of compelling them to pay debts in satisfaction of his legacy; for the debtors contracted with the testator, and are answerable only to him, or to his representatives. If however the debtors collude with the executor for the purpose of defrauding the legatees, or if the executor causelessly refuses to sue the debtors, the legatees are entitled to sue them. A plaint filed by legatees, under such circumstances, ought to set forth the special reasons which make it proper that their suit should be entertained.

Unless colluding.

Executor alone can bring suit to foreclose mortgage.

Where a mortgagee devises the mortgage security by his will, and appoints an executor, the executor is the proper person

(a) Sel. Rep. 30th September, 1847, v. 7, p. 399.

to bring a suit for foreclosure of the mortgage; and in one case, where the executor was stated to be in prison, but where it does not appear that he was unwilling or unable to sue, and where he was not made a party to the suit either as plaintiff or as defendant; it was decided that the foreclosure could not be enforced by the guardian of an infant devisee, nor even by a devisee of full age.(*b*) But it is conceived that if the executor had been unwilling or unable to sue, the devisee or his guardian, if he was under age, might properly have sued for foreclosure, making the executor a defendant.

Creditors of legatee cannot sue for legacy.

All the creditors of A. are of course interested in his obtaining payment of any debts or legacies to which he may be entitled; yet they cannot sue those who are liable to pay him such debts or legacies; for the persons liable to pay A. are strangers to his creditors, and have no means of judging whether the demands upon him are just, or whether he may not have other creditors equally entitled.(*c*)

So in cases of land tenure. The neem-ousut talookdar or holder of a sub-grant of land, is constituted by the ousut talookdar or original grantee, to whom his ground-rents are payable. If they be in arrear, the ousut talookdar should take proceedings against neem-ousut talookdar: but the zemindar cannot sue the neem-ousut talookdar, with whom he has entered into no engagements.(*d*)

Where principal may sue those with whom agent dealt.

But where an agent has been employed, his principal has, in many cases, a right to demand the property with which he has been entrusted, or the value of it, from those with whom the agent has had dealings. Thus a merchant, who has employed a factor to sell his goods, may demand the price of the goods from those to whom the factor has sold them, if the factor has not been paid.

Derivative purchaser.

A private purchaser of an estate from one who has bought it at public auction, may sue the original proprietors for possession.(*e*)

(*b*) Sel. Rep. 24th November, 1842, v. 7, p. 119.

(*c*) S. D. 1848, 8th April, p. 302.

(*d*) S. D. 1848, 1st July, p. 626.

(*e*) S. D. 1848, 22nd April, p. 355.

Person making advances to ryots.

A man who makes advances to his ryots for the growth of indigo, thereby acquires such an interest in their crops, that he may bring an action for damages against any person who injures the crops.(*f*)

General effect of documents to be stated.

Where they should be set forth at length.

In most cases it is sufficient to state in general terms the purport and material contents of deeds or documents. But the very words ought to be set forth, when any question in the cause is likely to turn upon the precise words of the instrument, or where its meaning is contested, or when the expressions of an instrument or writing are such, that any attempt to state their substance without introducing the very words in which they are expressed, would be ineffectual.

Of certainty in stating the case.

The complainant must set out his cause so clearly as to enable the defendant to know the precise grounds on which the suit is brought.

Specification of errors in opening closed transactions.

When it is sought to open a transaction which is *primâ facie* a closed one, such as an award which has been made, or an account which has been settled; a mere general allegation of error is not enough; but the particular objection to the award, or the mistakes in the account, ought to be specified.

Suit for title-deeds and lands.

If a suit be brought for title-deeds relating to lands in the possession of the defendant, and for the possession of the lands; the plaintiff must state what the deeds are, or what the property is to which they apply: it is not enough to state that under some deeds in the possession of the defendants the complainant is entitled to some interest in some estates, in their possession.

But it is otherwise, if the ground of the suit be, that the defendant has got possession of the title deeds and has intermixed the boundaries of the disputed estate with his own, so that the plaintiff is prevented by the act of the defendant from stating his own claim precisely.

Prayer in the alternative.

It sometimes happens the plaintiff is not certain of his title to the specific relief he wishes to pray for: the prayer may

(*f*) S. D. 1849, 26th April, p. 124.

therefore be framed in the alternative, in order that if one species of relief is denied him, another may be granted.

Extent and boundaries of land.

In a suit for the possession of land, the extent and the boundaries of the land ought to be stated with as much precision as possible;(*g*) but if the boundaries be set forth, the land may be decreed to the plaintiff, even though its quantity be somewhat more than that stated in the plaint.(*h*)

The plaint must contain all information which is necessary to give it certainty and precision with regard to the subject matter of the suit.

Thus in the North-Western Provinces(*i*) wherever that species of land tenure prevails, in which the interests of the numerous co-proprietors of each estate depend upon the extent of land in each man's occupancy, and not upon the laws of inheritance, the plaintiff is required to state the exact fields, with their numbers in the muntukhub, (or list of the cultivators, whether proprietors or otherwise, disposed according to the subdivisions of the estate in which they hold lands,) which he claims to transfer from the possession of the defendant to his own.

But no such specification is required where the estate is held by co-sharers in definite fractional portions, each man's interest depending wholly upon the laws of inheritance.

What a plaint ought not to contain.

A plaint ought to contain such matter only as is apparently material and relevant to the suit. It ought to contain no impertinence or scandal, that is to say, no unnecessary repetition of former pleadings, no terms of abuse or reproach against the opposite party, his Vakeels, witnesses or other persons, and no groundless imputation on any Court of Justice or public Officer.

It is the duty of all Judges to restrain and discourage as much as possible, the introduction of any such matter into the

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(*g*) S. D. 1848, 29th June, p. 613; 1st July, p. 619; 16th August, p. 769; S. D. 1850, 12th March, p. 43.

(*h*) Sel. Rep. 23rd June, 1841, v. 7, p. 39.

(*i*) Cir. Ord. West. C. 24th June 1842 and 15th March, 1845; Cal. Review, v. 12, p. 451.

record: and it is the duty of the Vakeels to sign and file no pleadings without previously ascertaining that they contain no such matter.(*j*)

Scandal.

Scandal consists in the allegation of any thing which it is unbecoming the dignity of the Court to hear, or which charges any person with crime or misconduct not necessary to be shewn in the cause.

Where criminatory matter is scandalous and where not.

But even where the words in the record impute extreme misconduct, yet if they are material to the subject of the suit, they will not be considered to be scandalous.

Thus parties may be stated on the record to be guilty of fraudulent and wicked actions; as where one has obtained advantages by personating another man, or by making false representations, or by immoral compliances of any sort; or where a trustee or executor is acting corruptly or maliciously, or is a person of violent and drunken habits and unfit to be trusted with money, and it is the object of the suit to remove him from the trust; in such cases as these, criminatory allegations, which are material to the success of the suit, may with propriety be introduced into the record; in order that the party making them may be enabled to adduce his proofs, and that the party against whom they are made may have notice of the charges and may defend himself against them.

But the allegation must be of such a nature that, if substantiated, it would influence the decree of the Court in the particular suit; if it be not relevant to the matter in hand, it is scandalous.

Thus if A. is enforcing in the usual way against B. an undoubted legal right, such as the execution of a decree: it is irrelevant, and therefore scandalous, to allege upon the record that A. is an enemy of B. and obtained an assignment of the decree for the purpose of annoying him: or that A. brings his suit out of revenge because he has been unsuccessful in

(*j*) Reg. XXVII., 1814, Sec. 9, Cls. 1, 3. Supra, p. 110, Reg. XXIII., 1814, Sec. 17.

another suit: for the Judge cannot be influenced in his decision by the opinion which he may entertain of the character or the motives of the litigants.(*k*)

Impertinent or irrelevant matter.

The prohibition extends to all recitals or statements which are immaterial to the subject of the suit, and to all matters purely superfluous.

All such errors cause embarrassment, delay, and needless expense.

A Vakeel who signs and files pleadings disfigured by faults of this kind may be censured and fined by the Court(*l*) and defamatory and libellous expressions when used by a party in the course of a judicial proceeding are punishable as a contempt of the Court in which they were used.(*m*)

(*k*) S. D. 1849, p. 176. Ibid, 27th August, p. 364. Ibid, 1848, July 4th, p. 639.

(*l*) Reg. XXVII., 1814, Sec. 9, Cl. 3.

(*m*) Sel. Rep. 22nd April, 1841, v. 7, p. 29.

CHAPTER XIV.

VALUATION OF SUITS.

SECTION I.

VALUATION AT ONE YEAR'S JUMMA.

Lands not permanently assessed.

IN a suit for lands paying revenue to Government, and not permanently assessed, if they form an entire mehal, or a specific portion of a mehal with a defined jumma, or rent payable to Government in respect of the portion, the value of the suit is assumed at the amount of the annual jumma.(*n*)

Holdings of ryots.

Suits instituted with a view to fix the jumma of a ryot's holding, are estimated at one year's rent; although it is evident that in such suits not merely the one year's rent, but also the right to an increase of rent during succeeding years, is virtually brought into question.(*o*)

SECTION II.

VALUATION AT THREE YEARS' JUMMA.

Lands permanently assessed.

IN suits for lands paying revenue to Government and which have been assessed in perpetuity, if they form an entire mehal, or a specific portion of it with a defined jumma, the value of the suit is assumed at three times the annual jumma payable to Government on account of such mehal or portion.(*p*)

(*n*) Reg. X., 1829, Sch. B. Art. VIII. Con. 1143, West. C. 24th March, Cal. C. 6th April, 1838.

(*o*) Con. 1272, Cal. C. 31st January, West C. 19th June, 1840, Con. 811, 2nd August, 1833.

(*p*) Reg. X., 1829, Sch. B. Art. VIII. Con. 1143, West. C. 24th March, Cal. C. 6th April, 1838.

If the suit be not for a specific portion of a mehal, upon which specific portion a definite jumma has been fixed, but for a definite fractional part of the entire mehal, one jumma being assessed upon the entire mehal, the suit is valued at three times the corresponding fractional part of the entire jumma.(*q*)

Fractional part of mehal.

In suits by a Collector against a farmer and his sureties under Sections 26 and 28 of Regulation XXVII., 1803,(*r*) or for the forfeiture of a estate for resistance or evasion of process,(*s*) the value of the suit is determined by the jumma of the estate which has been forfeited, or from which the arrear is due; and not by the amount of the fine to be levied, nor of the arrear due.

Suit by Collector for arrears or forfeiture.

SECTION III.

VALUATION AT EIGHTEEN TIMES THE ANNUAL RENT.

THE value of a suit for lands not paying revenue to Government, is assumed at eighteen times the amount of the annual rent by computation.(*t*)

Lands not paying revenue.

SECTION IV.

VALUATION ACCORDING TO AGGREGATE VALUE OF THINGS SUED FOR.

IF the suit be for two or more distinctly assessed mouzahs or mehals, the cause of action being one and the same, the valuation is made by adding together the sums at which each estate would be valued in a separate suit for it.(*u*)

Suits for two distinct estates.

A suit for the possession of lands, and for the mesne profits which accrued while the plaintiff was out of possession, is

Suit for land and money.

(*q*) Con. 1340, West. C. 18th May, Cal. C. 17th June 1842.

(*r*) Con. 808, West. C. 2nd, Cal. C. 30th August, 1833.

(*s*) Con. 386, 27th May 1825. Infra Chap. XVI.

(*t*) Reg. X., 1829, Sch. B. Art. VIII.

(*u*) Con. 577, 5th November, 1830.

valued, in respect of the land, according to the rules already laid down; and in respect of the mesne profits, at the amount sued for; and the aggregate of these two sums gives the total value at which the suit is estimated.(*v*)

The estimate is made upon the same principle when a claim for lands is brought, in connexion with a money demand, not being for mesne profits.

SECTION V.

VALUATION AT RATE LAID BY PLAINTIFF.

Miscellaneous demands.

In suits for compensation for injury, and the like, the value of the suit is computed at the rate assumed by the plaintiff.(*w*)

Even where the plaintiff does not seek to recover a sum of money, but sues for re-admission to caste, it is necessary for him to specify in his plaint a certain amount, in order to the institution of the suit. There do not appear to be any rules for fixing such amount.(*x*)

Suit to reverse decision of Collector.

If a resident cultivator sue for reversal of a summary decision passed by a Collector, adjudging a balance against him and ejecting him as a defaulter, the value of the suit is estimated at the amount of the rent in dispute, *i. e.*, at the sum originally sued for before the Collector.(*y*)

Suit for debt on bond.

Where a suit is instituted to enforce a bond given for securing money, and the validity and effect of the bond form the real subject matter of the suit, the value is calculated upon the principal sum lent on the bond.

But where the validity and effect of the bond are not in dispute, and the object of the suit is to recover a sum of money consisting of principal, or interest, or both, due indeed under

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(*v*) S. D. 1849, 3rd May, p. 135, 8th January, p. 4. See Ibid, pp. 213, 238.

(*w*) Reg. X., 1829, Sch. B. Art VIII.

(*x*) Sel. Rep. 13th April, 1847, v. 7, p. 288.

(*y*) Con. 862, West. C. 7th, Cal. C. 28th February, 1834.

the bond, but not being the whole amount secured by the bond, the value of the suit is determined by the amount which is sued for.(z)

By the Circular Order of the 14th May 1847, it appears to have been intended to rule that if the suit be instituted to recover the whole balance of principal and interest remaining due upon a bond, so that when the claim is satisfied, the account upon that bond will be finally closed, the stamp must be sufficient to cover the whole claim; and that if the suit be instituted for the recovery of an instalment, with or without interest, the stamp must be of a value equal to the aggregate amount of the instalment and interest claimed, and of the sum of all instalments due or to become due thereafter.

Principal includes subordinate right.

The value of the principal includes that of the subordinate right. Thus where a man brought suit to recover mesne profits of a haut or fair, and interest thereupon, and also to compel the defendant to keep up an establishment of accountants in the haut, laying his suit at the sum which he sought to recover, it was held to be unnecessary for him to estimate the value of the right to have accountants appointed.(a)

SECTION VI.

VALUATION AT THE ESTIMATED SELLING PRICE.

In suits for(b) houses, gardens, and other things of value, real or personal, not of the descriptions above specified, as well as for any interest in malguzary or revenue-paying land not capable of valuation under the rules already stated, (as for instance where lands form part of an assessed estate, but do not constitute a definite fractional portion of it nor a specific

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(z) Cir. Ord. 20th April, 1818, Con. 409, 2nd December, 1825.
(a) R. S. C. 16th March, 1846, p. 77.
(b) Reg. X., 1829, Sch. B. Art. VIII.

portion with a defined jumma);(*d*) the value of the suit is computed according to the estimated selling price, and the plaintiff is not at liberty to substitute any other standard of value, such as an arbitrary jumma assumed by himself, or the alleged amount of the annual produce of the lands.

If the plaint specifies the annual produce of the land sued for, his estimate of the selling price is judged of accordingly, and if it be too low he is nonsuited.(*e*)

It is a question as yet undetermined, whether under Section 3, Regulation IV., 1793, and Regulation X., 1829, Schedule B. Art. VIII., a garden consisting of lakhiraj land, yielding no rent to its owner, but held directly by him, should or should not be valued for the purposes of the suit at the estimated selling price.(*f*)

Suit for sale of land in satisfaction of judgment.

A suit to recover possession of a mela or fair, is laid at the estimated value of the interest claimed.(*g*)

The same rule prevails where the thing claimed is an ijarah or the jote of a cultivating ryot.(*h*)

A suit to obtain the sale of lands in satisfaction of a judgment which has been obtained against their owner in a previous suit, is computed at the estimated selling price, or, if that be in excess of the plaintiff's claim under the judgment, at the amount of the plaintiff's claim.(*i*)

Suit by mortgagor, for property mortgaged.

In suits brought by a mortgagor to regain possession of property mortgaged, the amount of stamp is calculated on the value of the property, according to the rules of valuation already laid down, and not on the sum for which the property was mortgaged.(*j*)

(*d*) Cir. Ord. Cal. and West. C. 23rd August 1833; Sel. Rep. 16th February, 1841, v. 7, p. 19; S. D. 1848, 29th June, p. 613.

(*e*) R. S. C. 2nd October, 1847, p. 120; Reg. X., 1829, Sch. B. Art VIII., note to para. 4.

(*f*) S. D. 1848, 29th June, p. 613.

(*g*) Sel. Rep. 21st January, 1816, vol. 7, p. 225.

(*h*) Con. 702, Cal. C. 6th, West. C. 27th July, 1832.

(*i*) Con. 1301, West. C. 25th June, Cal. C. 16th July, 1841; 2 Sevestre's Reports, 7th July 1845, p. 173. Infra Chap. XXVIII.

(*j*) Con. 957, West. C. 17th June, Cal. C. 7th August, 1835.

Old and new currency.

The Sicca rupee having ceased to be a legal tender on the 1st January 1838,(*k*) it has been laid down that all questions regarding the value of the stamped paper upon which plaints are written are to be determined with reference to the existing and not the old currency.(*l*)

In a suit on an account kept in Sicca rupees, if the agreement was for value, and not for specific coins, the calculation must be made at Company's rupees 106-10-8, for 100 Sicca rupees.(*m*)

SECTION VII.

SUITS FOR PRE-EMPTION.

SUITS to enforce a right of pre-emption of land are valued as suits for possession of the same land would be.(*n*)

(*k*) Act XIII., 1836.
(*l*) Cir. Ord. 15th April, 1842.
(*m*) Con. 1151, 27th April, 1838.
(*n*) See Con. 1047, Cal. C. 23rd September, West. C. 14th October, 1836.

CHAPTER XV.

IN WHAT COURT SUIT MUST BE BROUGHT.

SECTION I.

AS TO THE RANK OF THE JUDGE.

The different Courts.

THE Civil Courts of the East India Company are of four grades. 1. The Court of the Zillah Judge.(*o*) 2. That of the Principal Sudder Ameen. 3. That of the Sudder Ameen. 4. That of the Moonsiff.

1. Court of Moonsiff. Limit of jurisdiction rupees 300.

A suit may be brought in the Moonsiff's Court for the "property or proprietary right in the possession of" land (whether exempt from the payment of revenue or not) or other real property, the value of which, computed according to the rules stated in the foregoing chapter, does not exceed three hundred Company's rupees.

Claims for personalty under rupees 300.

Suits of any kind, other than suits of the kind just mentioned, may be brought in the Moonsiff's Court, if the claim does not exceed in amount or value the sum of three hundred rupees, and if it includes the whole amount of the demand arising from the cause of action. There are, however, certain special exceptions which will be noticed below. The Moonsiff also has jurisdiction to try suits referred to him, under the rules hereinafter mentioned, by the superior authorities.(*p*)

(*o*) The Judges of Patna, Dacca, and Moorshedabad were originally Judges of those cities only, and are still called City Judges though their jurisdiction has been extended over large rural districts. They always possessed the powers of Zillah Judges, and they may be considered as Zillah Judges in all but name.

(*p*) Reg. V., 1831, Sec. 5, Cl. 2; Act VI., 1843, Sec. 8; Cir. Ord. 8th October, 1844, para. 2.

A Moonsiff may entertain a suit having reference to lands, held exempt from the payment of rent, where the validity of the rent-free tenure is not disputed, and where the question at issue relates to the right of the ownership only. But if the right to hold land free from assessment be a point in dispute, then, whether the dispute be with the Government or with a private zemindar, the Moonsiff has no jurisdiction. In such a case he ought to nonsuit the plaintiff, or to refer him to the Court which has jurisdiction, or to apply to the Zillah Judge for instructions to forward the case to him, in order that it may be placed on his file, and may be referred to him, the proper tribunal.(*q*)

Moonsiff may try title to lakhiraj land, but not the validity of the tenure.

A Moonsiff may try a suit brought by a zemindar against his tenant, for an increased rent, provided the sum claimed in the suit do not exceed three hundred rupees; although it is manifest that a right of much greater value is virtually in issue.(*r*)

Suit to enhance rent.

A tenant who is sued for rent in a Moonsiff's Court cannot remove the suit from that Court, merely by affirming that the land for which the rent is demanded is lakhiraj or not liable to rent: for if it be proved by the village accounts duly authenticated, or by other legal evidence, that the tenant did pay rent for the preceding year, it is the duty of the Moonsiff to pass a decree for such amount of rent as may appear to be due, leaving the ryot to establish his right to hold the land as lakhiraj by a suit instituted under Regulation II., 1819, Section 30.(*s*)

Where suit for rent is not stopped by allegation of lakhiraj tenure.

Moonsiffs may receive, try, and decide claims to arrears of rent preferred by regular suit, and may dispose of all claims preferred by under-tenants or others who may be desirous of

Suits between landlord and tenant.

(*q*) Reg. II., 1819, Sec. 30, Cl. 1; Cir. Ord. No. 95, 30th August 1833; Cir. Ord. No. 67, 8th October 1844; S. D. 1847, 1st July, p. 301; S. D. 1849, 10th May, p. 146; Con. 484, 25th February, 1831; Con. 1261, West. C. 6th December, 1839, Cal. C. 3rd January, 1840.

(*r*) Con. 811, 2nd August, 1833.

(*s*) Con. 696, Cal. C. 25th May, West. C. 6th July, 1832.

resisting the distraint of their property or the attachment of their persons, or who may prefer a claim for damages for such acts.(*t*)

Duty of Moonsiff where suit for rent is pending elsewhere.

In all cases relating to arrears or exactions of rent, whenever a Moonsiff or any other subordinate judicial authority has reason to know that a cause concerning the same matter is pending before another Court, or is pending as a summary suit before the Collector, it is his duty to suspend his proceedings and to submit them to the Zillah Judge.(*u*)

Land under rupees 300 may be sued for though part of larger estate.

If the value of the land sued for is within three hundred rupees, and if the suit comprises the entire claim of the plaintiff in respect of the same cause of action, the Moonsiff has jurisdiction to entertain it, although the land sued for may form a portion of a purchase of greater value, exceeding the amount which may be sued for in the Moonsiff's Court.(*v*)

Suit for balance on bond.

If the suit be instituted to recover the balance of principal and interest due on a bond for more than three hundred rupees, and the amount claimed be within the competence of a Moonsiff, the Moonsiff has jurisdiction.(*w*)

Suit for instalment.

And so if the suit be instituted for the recovery of an instalment, with or without interest, and if the sum thereof, together with the sum of all other instalments subsequently claimable under the bond, be within the competence of a Moonsiff.(*x*)

Separate suits between same parties.

A Moonsiff may determine three several suits between the same parties, for three sums of one hundred and fifty rupees each, for which three several bonds were given the same day.(*y*)

Here it is evident that the parties themselves intended the three transactions to be separate.

Items of a running account.

But where a debtor has an account running from day to day, although each item of goods supplied, or of work done, forms

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(*t*) Reg. VIII., 1831, Sec. 11.

(*u*) Reg. VIII., 1831, Sec. 16, S. D. 1847, 20th March, p. 81.

(*v*) S. D. 1849, 16th August, p. 352.

(*w*) Cir. Ord. 14th May, 1847. Supra, p. 127.

(*x*) Ibid.

(*y*) Con. 481, 2nd May, 1828.

the subject of a separate contract, so that, after the stipulated price becomes due, the creditor could sue for each item; yet the understanding in such cases certainly is, that the dealing is not to terminate with one contract, but is to be continuous, so that if one item is not paid it shall be united with other items and form one entire demand. If, therefore, after several items are added to the first, the creditor were to bring separate actions for each as a distinct debt, the total exceeding three hundred Rupees, this would amount to a splitting(*z*) of claims for the purpose of having a demand really above three hundred rupees, decided by a Court whose jurisdiction is limited to that sum: and the Moonsiff's Court would have no jurisdiction.

Where jurisdiction depends on nature of defence.

A difficulty sometimes arises as to the jurisdiction, where a suit is instituted before the Moonsiff for a sum within his competency to adjudicate upon, but which may involve the discussion of engagements to a larger amount. In such cases, the Courts appear to have held that the jurisdiction of the Moonsiff depends in great measure upon the line of defence which may be adopted, and that if such defence be merely that the sum sued for has been paid, so that the validity of the original engagement is not brought into question, the Moonsiff has jurisdiction.(*a*)

2. Sudder Ameen. Limit of jurisdiction rupees 1,000.

The jurisdiction of the Sudder Ameen resembles that of the Moonsiff, except that its limit is one thousand rupees instead of three hundred rupees, and all suits for claims ranging between these sums ought to be instituted in the Court of the Sudder Ameen.(*b*) He cannot, any more than a Moonsiff, try a lakhiraj title.(*c*) There are other exceptions from his jurisdiction, which will be noticed below.

(*z*) Supra, Chapter X.

(*a*) Cir. Ord. Cal. C. 16th July, West. C. 13th August, 1841. Cir. Ord. Cal. and West. C. 31st August, 1832.

(*b*) Reg. V., 1831, Sec. 15, Cl. 2.

(*c*) Con. 589, 8th April, 1831. Con. 499, 27th March, 1829; S. D. 1848, 29th February, p. 120.

The Sudder Ameen is also competent to try causes referred to him by superior authority, under the rules stated below.(*d*)

3. Principal Sudder Ameen. Jurisdiction practically unlimited.

What has been said of the Sudder Ameen applies likewise to the Principal Sudder Ameen, except that the limit of his ordinary jurisdiction is five thousand rupees.(*e*)

In cases referred to him by superior authority, his jurisdiction has no limit in amount or value.(*f*)

Suits in which rent-free tenure is disputed, to be referred to Collector.

In matters relating to the tenure of land free from assessment, (of which, as already stated, the Sudder Ameen and the Moonsiff cannot take cognizance) the Principal Sudder Ameen and his superior, the Zillah Judge, can only proceed after receiving the report of the Collector.

All suits, therefore, preferred by proprietors, farmers or talookdars for the revenue of any land held free from assessment, as well as all suits so preferred by individuals claiming to hold lands exempt from revenue, are, immediately upon their institution, to be referred to the Collector or the Officer exercising the powers of Collector, for investigation and report.(*g*)

This rule applies to all suits in which the lakhiraj tenure is in dispute, and not to those only in which the Government is a party.(*h*)

It embraces those suits only, in which the point at issue is the right to hold land free of rent, or to resume land held as rent-free under tenures, which are alleged to be illegal or invalid. It does not apply to suits for possession or for rent of land held exempt from the payment of revenue to Government, where the validity of the exemption is not disputed.(*i*)

(*d*) Infra, Sec. 3.

(*e*) Reg. V., 1831, Sec. 18, Cl. 1.

(*f*) Act IX., 1844, Act XXV., 1837, Sec. 1. Infra, Sec. 3.

(*g*) Reg. II., 1819, Sec. 30, Cl. 1; Con. 589, 8th April, 1831; Cir. Ord. 8th October, 1844, para. 3; S. D. 1847, 1st July, p. 301; S. D. 1848, 29th February, p. 120; S. D. 1849, May 10th, p. 146; Ibid, December 27th, p. 487.

(*h*) Con. 527, 30th October, 1829.

(*i*) Con. 669, 13th January, 1832; Cir. Ord. Cal. and West. C. 30th August, 1833.

But the report of the Collector is required if the nature of the tenure as well as the proprietary right is disputed;—*e. g.*, if a zemindar claims possession of land as attached to his estate, and the defendant holds possession thereof as rent-free, or *vice versâ*.(*j*)

Investigation by Collector.

The Collector, on reference thus made to him by the Civil Court, personally investigates (for this is a duty which he cannot delegate to his assistant) (*k*) the question in the manner prescribed by the Regulations; and on closing his proceedings, he transmits them, with all the documents therein referred to, to the court by which the reference shall have been made, recording his opinion upon the case.(*l*)

His report.

Trial by Court on report of Collector.

The Court then proceeds to try and decide the case in the ordinary manner.

It may admit such further evidence as may appear necessary; but it cannot receive any sunnud, account, or other documentary evidence of any kind, which has not been produced before the Collector, and for not producing which the party has not assigned a sufficient cause.

Report not binding on Court.

The Court cannot decide the case without a report from the Collector,(*m*) but the report of the Collector is not conclusive upon the question referred to him, and if the Collector has pronounced in favour of the person claiming to hold land rent-free, upon evidence which is legally insufficient to constitute a lakhiraj title, (as where there is nothing to point out when and by whom the tenure was created,) it is the duty of the Civil Court to decide against the opinion of the Collector, unless these defects be remedied in the course of the civil trial.(*n*)

4. Zillah Judge.

The Zillah Judge has primary jurisdiction in all suits, of whatever value.(*o*)

(*j*) Con. 981; Cal. C. 16th September, 1835, West. C. 11th March, 1836.

(*k*) Con. 603, 21st October, 1831.

(*l*) Reg. II., 1819, Sec. 30, Secs. 20, 21.

(*m*) Sel. Rep. 21st June, 1842, v. 7. p. 107.

(*n*) Con. 450, 30th March, 1827; S. D. 1849, 27th December, p. 487; S. D. 1848, 29th February, p. 120.

(*o*) Reg. V., 1831, Sec. 27, Cl. 3.

All suits above the value of five thousand rupees ought to be instituted in his Court.

Suits below that value are not usually or properly brought before him in the first instance, except under peculiar circumstances: he may, however, if he perceives any special reasons, receive and try them.(*p*)

In suits in which the validity of a lakhiraj tenure is in dispute, the duty of the Judge is the same as that of a Principal Sudder Ameen, except that if he thinks such cases proper to be decided by the Principal Sudder Ameen, he may refer them in the first instance to the Principal Sudder Ameen (*q*) by whom they are referred to the Collector for report.

Causes belonging properly to the Zillah Court.

The Zillah Courts are the proper tribunals for receiving and trying:—

Suits under Regulation IV., 1812, instituted or defended by the public officers on behalf of sovereign native princes.(*r*)

Actions against uncovenanted Judges in reference to Regulation XXIII., 1814, Sections 10 and 67, for corruption, extortion, or any oppressive or unwarranted act of authority, and in which suits the decree may cause the offender to pay damages to the party injured.(*s*)

Charges under Regulation XII., 1793, Section 8, Regulation XI., 1795, Regulation XI., 1803, Section 8, Regulation III., 1807, Sections 2 and 3, of corruption or extortion against the law officers of the Zillah Courts, in which cases the decree would adjudge the offender to refund the amount or value of the money or property received or taken with interest and costs of suit.(*t*)

Suits under Regulation XXXIX., 1793, Section 11, Regulation XLIX., 1795, Section 3, Regulation XLVI., 1803, Section 11, against cazees for undue practices in the discharge of the duties prescribed to them by the Regulations.(*u*)

(*p*) Supra, p. 106.

(*q*) See infra, Sec. 3.

(*r*) Govt. Ord. No. 3, 15th June, 1834.

(*s*) Ibid, No. 7.

(*t*) Ibid, No. 8.

(*u*) Ibid, No. 9. As to suits cognizable in Military Courts of Requests, see Marshman's Civil Guide, 2nd Ed. p 79.

Suits under Regulation XIV., 1793, Section 33, and Regulation XXVII., 1803, Section 36, against a Collector for sums of money demanded, directly or indirectly received or taken by him for his use from any proprietor or farmer of land, or any surety or any purchaser of land, or for acts done in his official capacity, repugnant to the Regulations or not warranted thereby, and that do not involve any claim to sums received or demanded by him on behalf of Government in conformity to the Regulations.(*v*)

SECTION II.

AS TO THE LOCAL LIMITS OF THE JURISDICTION.

Suits relating to land.

If the complaint relates to land or other real property, the suit must be instituted in the Court, within the limits of whose jurisdiction the property is situated.(*w*)

Residence of defendant immaterial.

Where the suit relates to land, the situation of the land alone determines the jurisdiction, and no weight is attached to the circumstance that the defendant may be resident beyond the local limits of the Court's jurisdiction, as for instance in Calcutta.(*x*)

Suit to reverse sale of land.

If real property has been wrongfully sold in execution of a decree, the reversal of the sale must be sued for in the district in which the property is situated, and not in that in which the decree was passed.(*y*)

How local limits of jurisdiction are determined.

The local limits of the jurisdiction of a Civil Court are determined in all cases, whether relating to land or to other matters, solely with reference to the division which has been made of the country for judicial purposes, and are not affected in any way by the Revenue or Police divisions.(*z*)

(*v*) Ibid, No. 17. For further information as to suits cognizable by the different tribunals, See Civil Guide, pp. 93, 97.

(*w*) Reg. III., 1793, Sec. 8, Benares, Reg. VII., 1795, Sec. 7, Ced. and Conq. Prov. Reg. II., 1803, Sec. 5.

(*x*) Con. 991, Cal. and West. C. 8th January, 1836, Con. 956, West. C. 12th June, Cal. C. 10th July, 1835.

(*y*) R. S. C. 7th March, 1848, p. 135.

(*z*) Con. 915, West. C. 21st November, Cal. C. 5th December, 1834, Con. 969, 31st July, 1835.

When the property lies in different jurisdictions.

Where a suit is brought, founded on a right of inheritance, for property situated in two or more jurisdictions, it ought to be brought in the Court in whose jurisdiction the greater portion may be contained.(*a*)

If the property is situated within the limits of the same Zillah Court, but in the jurisdiction of different Moonsiffs, and if the value of the whole property does not exceed that of which those officers are competent to take cognizance, the Moonsiff, in whose Court the suit is brought, previously to issuing any process on the petition of plaint, should apply to the Judge to whom he is subordinate, for authority to try the case; but where the property is situated within the limits of different Zillah Courts, he should apply to the Sudder Court through the Judge, for authority to proceed with the case; and the same rule should be observed by the Judge, as regards any suits of the latter description which may be instituted in the first instance in his Court.(*b*)

Where the Judge neglects to apply to the Sudder Court for directions as to the trial of the case, his decision is a nullity.(*c*) For he can have no jurisdiction in another zillah until it is given him by the Sudder Court. That body is empowered to transfer prospectively, not to sanction retrospectively, the cognizance of suit by one Zillah Court instead of another; and if any proceedings have been had before the order of the Sudder Court is obtained, they go for nothing and fresh process must be issued as at the beginning of a suit.(*d*)

Where property under different Sudder Courts.

When the property is situated partly in the lower, and partly in the Western Provinces, the application of the Judge in whose Court the suit may be brought, is made in the Sudder Court to which he is subordinate; and that Court, after communicating with the other Sudder Court, issues the necessary instructions for the trial of the case.(*e*)

(*a*) Cir. Ord. Cal. and West C. 11th January, 1839, para. 1.

(*b*) Ibid, para. 2.

(*c*) S. D. 1847, 15th June, p. 256, 7th January, p. 3.

(*d*) S. D. 1850, 12th March, p. 41.

(*e*) Cir. Ord. Cal. and West. C. 11th January, para. 3.

Suit not relating to land.

If the suit does not relate to land or other real property, it may be instituted, at the option of the plaintiff, either in the Court within the limits of whose jurisdiction the cause of action shall have arisen, or in that within whose limits the defendant, at the time of the commencement of the suit, shall reside as a fixed inhabitant.(*f*)

Where defendant is a fixed inhabitant.

The circumstances of a man's being an occasional visitor to a particular zillah or of his having available property within it, movable or immovable, will not of themselves subject him to the jurisdiction of the Zillah Court in respect of a suit not relating to landed or other real property within the zillah. He is not subject unless he be a fixed inhabitant.(*g*)

Discretion of Courts to determine place of trial.

The Courts are in certain cases guided by considerations of convenience in preferring, as the scene of trial, the place where the cause of action arose, to the place where the defendant resides.

Where local inquiry is needful.

It has been held that a suit for the recovery of an excess of rent collected, though admissible in the district in which the defendant resides, ought properly to be instituted and tried in the district where the cause of action arose; on the ground that any local inquiry which may be necessary, can be made with greater facility under the orders of the Court presiding over the judicial district in which the lands are included.(*h*)

Residents liable without reference to place of contract.

For a personal debt, wheresoever contracted, a man is liable to be sued in the Court within whose jurisdiction he may be resident: even though the debt may have been contracted in a foreign country, beyond the limits of the British territory,(*i*) or in Calcutta.(*j*)

(*f*) Reg. III., 1793, Sec. 8, Benares; Reg. VII., 1795, Sec. 7, Ced. and Conq. Prov.; Reg. II., 1803, Sec. 5; Con 866, West. C. 14th, Cal. C. 28th February, 1834.

(*g*) Con. 797, West. C. 14th June, Cal. C. 5th July, 1833; Con. 956, West. C. 12th June, Cal. C. 10th July, 1835.

(*h*) Con. 73, 4th January, 1811; Con. 871, Cal. C. 21st February, West. C. 21st March, 1834; R. S. C. 19th February, 1848, p. 132, which decides that Con. 73 is to be followed in such cases and not Con. 739.

(*i*) Sel. Rep. 20th August, 1810, v. 1, p. 306.

(*j*) Sel. Rep. 14th January, 1841, v. 7, p. 1.

Liability in place where cause of action arose.

In like manner a man is liable to be sued, alone or with others, in the Court within whose jurisdiction the cause of action arose, though he himself may not be resident, and may have no agent and no property, within the limits of that jurisdiction.(*k*)

The rules apply to representatives of contractors.

And this applies not only to the parties who originally contracted the obligation which it is sought to enforce by suit, but to their heirs and representatives.

What is considered the cause of action.

Thus where a man contracted a debt in zillah A. and died, leaving no property in that zillah, his heirs resident in zillah B. are liable to be sued in either zillah in respect of the debt.(*l*)

Mortgage Money.

A suit for the recovery of money advanced on mortgage, is cognizable in the district in which the money was advanced, and not in the district where the mortgaged land is situated, for the loan is the cause of action.(*m*)

Where a man resident in Calcutta, borrows money in Calcutta and grants his bond for it, and also mortgages immovable property in zillah A., as a security for the debt, his creditor cannot sue him in zillah A.for the recovery of the sum borrowed.(*n*) But the creditor may sue in zillah A. to enforce his rights, whatever they may be, against the property mortgaged.

Refusal of wife to return to her husband.

A suit by a husband against his wife and others, in order to oblige his wife to return to cohabit with him, is cognizable where the refusal to return occurred, and not in the district in which the marriage took place; for the refusal is held to be the cause of action.(*o*)

Transactions between consignor and consignee.

Where goods are consigned for sale by A. in one district, to B. in another district, and B. sells the goods, and applies the proceeds in discharge of a debt alleged to be due to him from A.; if A. contests the validity of this transaction, his cause of action is considered to have arisen in B.'s district.(*p*)

(*k*) Con. 721, Cal. C. 7th October, West. C. 9th November, 1832.

(*l*) R. S. C. 1st June, 1847, p. 103.

(*m*) Sel. Rep. 4th May, 1810, v. 1, p. 301.

(*n*) Sel. Rep. 5th January, 1842, v. 7, p. 69.

(*o*) Ubdool Mujeed, Petitioner; R. S. C. 17th March, 1846, p. 78.

(*p*) Sel. Rep. 30th July, 1838, vol. 6, p. 237.

How far acknowledgment is cause of action.

Where the claimant demands the money in question and the defendant admits the truth of the demand or promises to pay the money, it seems to be held(*q*) that this amounts to something equivalent to a new ground of action, so as to take the claim out of the law of limitation, but that it does not constitute a new ground of action so as to give jurisdiction to any tribunal which had not jurisdiction in respect of the original ground of action. The following construction is to be taken with this explanation.

What is considered the cause of action.

Bond.

Where money was borrowed in a foreign country, and a bond was executed within the British territories to secure the money, it was considered by the Sudder Court that the debt, and not the bond, was the cause of action, and that the suit was therefore not cognizable in the Civil Court, the defendants being still resident in a foreign country.(*r*)

But where certain persons being within a particular jurisdiction, contracted, one that he would deliver, and the other that he would receive and pay for, certain goods at a specified rate; and after the goods had been received and partly paid for, the same parties, within another jurisdiction, entered into an engagement to pay and to receive (respectively) the balance due, with interest, by instalments; it was decided that this new engagement constituted a new cause of action, and that an action for breach of it might be received and tried within the latter jurisdiction, although the defendant was not resident there.(*s*)

The Court ruled in this case, that the place for performing the condition of the bond or new engagement, and therefore the jurisdiction in which a suit for its non-performance would lie, must be taken to be the place where the new engagement was entered into; upon the general principle that unless otherwise expressed or clearly implied, the place of executing an instrument of contract is to be taken as that of its intended performance.

(*q*) Reg. II., 1805 preamble. S. D. 1849, March 15th, p. 68. See p. 69.

(*r*) Con. 351, 24th January, 1823.

(*s*) S. D. 1849, 15th March, p. 68.

This view, that the place for performing the condition of the engagement determines the jurisdiction in which a suit for its non-performance would lie, is not wholly in accordance with a previous construction(*t*) promulgated by the Sudder Court, by which it was determined that where a contract is made for the delivery of goods in a particular place, and the goods are not delivered accordingly, the action may be brought either where the contract was entered into or where the defendant is resident, but that the failure to deliver is not a circumstance which would give jurisdiction to the Court of that district in which the goods ought to have been delivered.

Probably the more convenient and the more liberal doctrine, and that which harmonizes best with the decisions of the Courts, is that which permits an action to be brought either in the forum of the place where the contract was made, or in that where the performance was to have taken place.(*u*) Either the contract may be considered as affording a cause of action to enforce performance—or the non-performance as giving cause of action for damages thereby incurred.(*v*)

Suits against public officers.

All complaints (cognizable by a Court of the East India Company) against the Collector of Customs at Calcutta, or his Public Officers, or any other Public Officer at the Presidency, are to be received, tried and determined, as prescribed in the Regulations, by the Judge of the Zillah of the 24-Pergunnahs.(*w*)

SECTION III.

TRANSFER AND REFERENCE OF SUIT.

Sudder Dewanny Adawlut may transfer suit from

THE Court of Sudder Dewanny Adawlut may order (recording at the same time its reasons) that any suit which has been

(*t*) Con. 866, West. C. 14th, Cal. C. 28th February, 1834.

(*u*) See Code de Procedure Civil: Liv. 2, tit. 25, pl. 420.

(*v*) See Sel. Rep. 26th October, 1813, v. 2, p. 89.

(*w*) Reg. VII., 1806, Sec. 8. See further as to jurisdiction of Court of the 24-Pergunnahs. Reg. III., 1793, Sec. 17; Con. 991, Cal. 1st, and West. C. 8th January, 1836; Act XXII., 1843.

brought before a Zillah Court, shall be transferred to any other Zillah Court.(x)

one Zillah Court to another.

The Sudder Court may likewise, by order under seal, authorize the Judge of any zillah to transfer to a Principal Sudder Ameen any civil proceedings, whether miscellaneous or summary, which may be depending at the time when the order is issued, or may be thereafter instituted in the Court of the Judge.

May order Judge to transfer to Principal Sudder Ameen miscellaneous and summary cases.

All proceedings so transferred, are disposed of by the Principal Sudder Ameen, according to the rules prescribed in the Regulations for the guidance of Zillah Judges in the like cases.(y)

The Zillah Judges may refer to any of the Sudder Ameens subject to their authority, for trial and decision, any original suit depending or instituted in their Courts, of the kind and to the amount already mentioned as cognizable by those Officers, (z) but not any suit which is not of such a nature as to be originally cognizable by a Sudder Ameen,(a); and to any Principal Sudder Ameen, subject to their authority, they may in like manner refer such suits, without any limit as to the amount of the demand.(b) A suit which is within the competency of a Sudder Ameen to decide, may thus be referred to a Principal Sudder Ameen.(c)

Judge may refer causes to Sudder Ameen with limit.

And to Principal Sudder Ameen without limit.

Original suits instituted before the Zillah Judge, whether *in formâ pauperis* or otherwise, ought in general to be at once transferred to the proper tribunal (according to the foregoing rules) for trial and decision; and whenever a Judge retains on his own file any original suit which he is authorized to refer to a Sudder Ameen or Principal Sudder Ameen, he is to record his reasons for so doing.(d)

To record reasons where he does not transfer.

(x) Act III., 1837, Secs. 1, 2. See Marshman's Civil Guide, p. 339.

(y) Act XXV., 1837, Sec. 8.

(z) Reg. V., 1831, Sec. 15, Cl. 2.

(a) Supra, p. 133, Con. 499, 27th March, 1829.

(b) Reg. V., 1831, Sec. 18, Cl. 1, Act XXV., 1837, Sec. 1; Supra, p. 13.

(c) 1848, 22nd July, p. 708.

(d) Cir. Ord. 15th January, 1841, para. 1, Reg. V., 1831; Cir. Ord. Cal. and West. C. 23rd February, 1838.

All suits which a Moonsiff is competent to decide, ought to be instituted in the Moonsiff's Court, but the Zillah Judge has power to withdraw such suits from the Court in which they may have been instituted; and either to try them himself, or to refer them for trial to the Court of any other Officer of the same or of a superior grade, subordinate to his authority.(*e*) But such cases ought only to be so referred on special reasons, recorded by the Judge.(*f*) So, it is competent for a Zillah Judge, whenever he may see sufficient reason for so doing, to withdraw any suit from the Principal Sudder Ameen's, or Sudder Ameen's Court, in which it may have been instituted, and to try it himself, or to refer it for trial to any other Court subordinate to his authority, and competent in respect of the valuation of the suit.(*g*)

May withdraw cause from inferior Court.

Suit for exactions or arrears of rent where proceedings pending before Collector.

If it be brought to the notice of a Judge, either by a reference from one of the subordinate judicial authorities or otherwise, that a suit relating to arrears or exactions of rent is pending in his Court or in any of the Courts subject to his control, in a matter regarding which a suit had been previously instituted before the Collector; it is the duty of the Judge to direct such suit to be transferred to the Collector, who in such a case is authorized and required to decide both suits.(*h*)

Proceedings for rent before Collector where suit pending in Court.

In like manner,(*i*) if it be brought to the notice of a Collector that a suit is pending before him in a matter regarding which a regular suit has been previously filed in the Judge's Court, the Collector must suspend his proceeding, and forward the record of the case to the Judge, who will make over both cases to some tribunal subject to his authority, or will dispose of the cases himself.

(*e*) Reg. V., 1831, Sec. 7; Cir. Ord. Cal. C. 7th December, West. C. 21st December, 1838; Reg. XXIII., 1814, Sec. 47, Cl. 1.

(*f*) Con. 833, West. C. 27th September, Cal. C. 18th October, 1833.

(*g*) Act IX., 1844, Sec. 2.

(*h*) Reg. VIII., 1831, Sec. 14. See S. D. 1847, 16th June, p. 261.

(*i*) Ibid, Sec. 15.

No Judge, European or Native, is permitted to hear or to try a cause in which either of the parties may be his creditor.(*j*)

No Judge to try cause of his creditor.

No Moonsiff is competent to try a suit in which he himself, or any of his relatives or dependents, or any of the Vakeels or Officers of his Court, is a party.(*k*)

What causes Moonsiff cannot try.

He may indeed receive such suits, but he must forward them to the Judge of the zillah to which he is subordinate, who may thereupon refer the same for trial and decision to any other Moonsiff of the district.(*l*)

He is to receive and forward them.

Suits against the Vakeels of Moonsiff's Courts for breaches of trust, fraud, or wilful misconduct, committed by them in their professional capacity, will be received and decided by the Moonsiff, but if the suit be in value beyond his competence, the Judge may transfer it to a competent Court, or retain it on his own list.(*m*)

A Moonsiff is not prohibited from trying a suit to which another Moonsiff is a party.

No suit can be referred for trial to any Sudder Ameen, in which he himself, or any of his relatives or dependents, or of the Vakeels or Officers of his Court, is a party.(*n*)

No suit can be referred to a Principal Sudder Ameen in which he himself, or any of his relatives or dependents, is a party.(*o*)

Where a suit cannot be referred to a Sudder Ameen because he or some of his relatives or dependents is a party, and when the Zillah Judge cannot refer such suit to be tried by any other competent authority, the Sudder Court may direct that such suit shall be transferred to any other Zillah Court subordinate to itself, and the Judge of such other Court may thereupon refer the cause in the same manner or if it had been originally instituted in his own Court.(*p*)

Where Sudder Ameen cannot try and there is no other competent authority in the zillah.

(*j*) Cir. Ord. Cal. and West. C. 26th March, 1832.

(*k*) Act VI., 1843, Sec. 8.

(*l*) Ibid, Sec. 9.

(*m*) Govt. Ord. No. 11, 15th January, 1834.

(*n*) Reg. V., 1831, Sec. 15, Cl. 2.

(*o*) Reg. V., 1831, Sec. 18. Cl. 1. Act XXVII., 1838, Sec. 1.

(*p*) Act XXVII., 1838, Sec. 2.

What suits ought not to be referred to Principal Sudder Ameen.

No suit in which the documentary evidence is in the English language ought to be referred to a Principal Sudder Ameen or to any inferior Judge, unless he be acquainted with that language; and it is the duty of the Judge, if any difficulty on this head be suggested, to inform himself on this subject before he makes the reference, and not to make the reference blindly, leaving it to the Principal Sudder Ameen to consider the objection and send back the case, and subjecting the suitors to unnecessary delay, and to the injurious consequences which delay may involve.(*q*)

Suits requiring acquaintance with the English language.

But this is to be understood,(*r*) of those cases only, in which the nature of the English writing, and of the transaction to which it may relate, appear to involve such complicated considerations as would make a knowledge of English indispensable to a correct adjudication of the case, not to cases where the initial petition merely refers to some English document of a simple nature, such as an account.

When a subordinate Judge finds himself, from imperfect acquaintance with English, unable to proceed to the adjudication of a case, he ought to report the case to the Zillah Judge for his decision, and ought not to proceed to decide it himself, with the assistance of irresponsible persons whom he may think competent to supply his deficiency in the knowledge of the English language.(*s*)

How suits under Regulation XIII., 1793, Sec. 11, are disposed of.

All suits under Regulation XIII., 1793, Section 11, and Regulation XII., 1803, Section 14, for extortion committed by native servants of Judges, which servants are not Officers of Court, are to be received by the Principal Sudder Ameen, Sudder Ameen, or Moonsiff, as they may be cognizable by one or other. A suit so received is to be immediately forwarded to the Judge, who will use his discretion in trying it himself or referring it to any other Principal Sudder

(*q*) Cir. Ord. Cal. and West. C. 23rd February, 1838, para. 4.

(*r*) Cir. Ord. Cal. C. 18th October, West. C. 31st October, 1830.

(*s*) S. D. 1848, 23rd March, p. 224.

Ameen, Sudder Ameen or Moonsiff by whom it may be cognizable.(*t*)

Judge cannot try appeal from his own decision when Collector.

Where a Collector is promoted to the office of Judge, he cannot try an appeal from a decision pronounced by himself, as Collector, under Section 30, Regulation II., 1819. But he may try, as Judge, a suit instituted for the reversal of an order passed by himself as Collector, for in the latter case the proceeding is not in the nature of an appeal, but is adopted for the purpose of obtaining that full investigation which the mechanism of a Court of Justice can alone afford: whereas in the former case the object is to obtain the decision of a new and higher authority upon the same data on which the Collector adjudicated;(*u*) and an Officer may decide, as Judge, causes on which he has reported to the Civil Court while he was Collector.(*v*)

But may entertain suit to reverse his own order as Collector.

Where a suit, which has been partly tried by a Sudder Ameen, is transferred by the Zillah Judge to the list of a Principal Sudder Ameen, the latter, whose Court is thus in fact constituted a Court of the first instance, cannot adopt the evidence already taken, but must try the cause anew from the very beginning.(*w*)

All the evidence in a cause ought to be brought forward under legal sanction and in public, in such a way that there may be the means of controverting it.

This obvious rule of justice is infringed where the Judge himself imports, as a ground of his decision, something which has come within his own knowledge, such as the resemblance of a claimant by inheritance, to his alleged father.(*x*)

If therefore a Judge has personal knowledge of a material fact in a cause, he ought to depose to it as a witness, and ought to be examined under the usual sanctions, and sub-

(*t*) Govt. Ord. No. 15; Civil Guide, p. 106.

(*u*) Sel. Rep. 23rd December, 1848, v. 7, p. 560.

(*v*) Con. 779, Cal. C. 12th April, West. C. 10th May, 1833.

(*w*) Sel. Rep. 24th March 1842, v. 7, p. 78.

(*x*) Jeswunt Singjee, *v.* Jet Singjee, 3 Moo. Ind. Ca. 245.

ject to the usual tests. But a Judge can hardly be deemed capable of impartially deciding on the admissibility of his own testimony, or of weighing it against that of another. He ought therefore to apply to the proper authority for an order of transfer.(*y*)

Stamp duty on referred suits.

Where the Zillah Judge refers to a Sudder Ameen or a Principal Sudder Ameen, a suit which is within the competency of a Moonsiff to decide, the suit is subject to the same stamp duty as if it had been received and tried by the Moonsiff.(*z*)

But where a suit, though brought for an amount not exceeding three hundred Rupees, is yet of such a nature as not to fall within the competency of a Moonsiff to decide, and is therefore referred to a Sudder Ameen; such suit is subject to the stamp duty prescribed for suits in the Sudder Ameen's Court.(*a*)

It has, however, been enacted, that in all suits which, in respect to value, are cognizable by a Sudder Ameen, the same stamps are sufficient in any other Court as would have been sufficient in the Court of a Sudder Ameen; and no exception is made even in the case of suits which though cognizable in respect of value merely, yet are not of such a nature as to fall within the competency of a Sudder Ameen.(*b*)

(*y*) S. D. 1847, 28th August, p. 482.

(*z*) Act XXV., 1837, Sec. 5.

(*a*) Con. 1277, Cal. C. 10th, West. C. 24th April, 1840

(*b*) Act XXV., 1837, Sec. 7; Act IX., 1844, Sec. 5.

CHAPTER XVI.

OF THE PROCESS OF THE CIVIL COURTS.

SECTION I.

HOW THE PERSON COMPLAINED OF IS BROUGHT BEFORE THE COURT.

Demand notified to defendant.

UPON the institution of a civil suit in any Court of whatever rank, the Judge of the Court issues a summons or notice under his seal and signature addressed to the defendant, and containing a short statement of the demand, with a requisition to attend in person or by Vakeel, and to deliver an answer to the plaint on or before a certain day specified in the notice.(*c*)

Special notification by Moonsiff, in cases of inheritance.

Where a suit is instituted in a Moonsiff's Court concerning the right of inheritance to a zemindary, talook, land, house or other real property; the Moonsiff, before issuing the usual and ordinary notice to the defendant, must affix in some conspicuous part of his cutcherry, and must also publish in the village in or near which the property is situated, a special written notification of the claim, with a requisition to all persons who may have any claim to the property sued for, to prefer the same within a limited period.(*d*)

Form of notice.

The ordinary notice is in the following form.(*e*)

In the Court of

Ramdhun of plaintiff,

v. Sheik Edoo of defendant.

(*c*) Reg. II., 1806, Sec. 2, Cl. 1. Reg. XXIII., 1814, Sec. 19, Cl. 1.

(*d*) Reg. V., 1831, Sec. 6, Cl. 4, Con. 1293, West. C. 30th April, Cal. C. 30th July, 1841.

(*e*) Cir. Ord. 1st March, 1841.

To Sheik Edoo, of Take notice that Ramdhun of has instituted a suit against you in this Court for the recovery of rupees; you are therefore required, agreeably to Regulation II., of 1806, to acknowledge the receipt of this notice, and further to attend in person or by Vakeel, and to deliver an answer to the plaint on or before the 22nd of April 1841.

Given under my hand and the seal of the Court, this 5th day of April 1841.

(L. S.) A. B., *Judge.*

or Principal Sudder Ameen, or Sudder Ameen, or Moonsiff.

Language of notice.

It will be convenient, in shewing how this notice is served, to state generally the manner in which the Court communicates to the parties its orders of every kind.

The notice already mentioned, and all other orders of the Courts, are written or printed in the Oordoo language and Nagree character in the North-Western Provinces and in Behar, in the Bengalee language and character in the Province of Bengal, and in the Ooriya language and character in the zillah of Cuttack, and in the adjacent pergunnahs.(*f*)

Process.

Every process, rule, order, or decree of the Courts, is immediately served or executed, without application to any person or the interference of any individual, according to its requisition, within the limits of the jurisdiction of each Court.

Executed by the Nazir.

The process is executed by the Nazir of the Court through his inferior officers, the peons attached to the Court;(*g*) but the Judge who orders the process to issue, may personally superintend its execution, if he for any special reason deems it necessary to be present.(*h*)

Execution of process against Police Officers.

Writs for the apprehension of the person, or for requiring the personal attendance of Police Officers under civil process,

(*f*) Reg. IV. 1793, Sec. 20, Reg. XIV., 1805, Sec. 11, Supra, p. 110.

(*g*) Reg. IV., 1793, Sec. 13; Reg. XXVI., 1814, Sec. 14; Act XIV., 1845; Cir. Ord. 17th November, 1845, Reg. V., 1831, Sec. 15; Cir. Ord. 11th May, 1832.

(*h*) Reg. I., 1825, Sec. 2.

are issued through the Magistrate. This rule does not apply to notices or proclamations, not requiring personal attendance, or to processes which give the party the option of appearing in person or by Vakeel.(*i*)

The process must not be headed with the names of any heathen deities.(*j*)

Fees on notice.

The amount of fees or tulubanah which may be demandable for its execution, is specified on the back of the process; and, the person taking it out pays the sum, before execution, to the Nazir, who endorses on the process,(*k*) his receipt for the amount.

Service in pauper cases.

It is enacted that in pauper cases, all processes shall be served through the chuprassies of the Court without any expense to the pauper.

There are certain chuprassies who receive regular pay and are attached to the Judge's Court; these are the proper Officers for this service, whether the suit be depending before the Judge or before an inferior Judicial Officer.(*l*)

Moonsiff's process may be executed by plaintiff.

But as the Moonsiffs are generally stationed at a distance from the Court of the Zillah Judge, it is usual in pauper cases for the process to be served by the pauper party himself; for it may be proper here to mention that when the notice to appear and answer issues from the Court of a Moonsiff, that Officer may, if required, deliver it to the plaintiff or his Vakeel, to be served upon the defendant either by the plaintiff personally, or by some one employed by the plaintiff for that purpose, whose name is endorsed by the Moonsiff upon the notice before it is sent out for execution. But although the law stands thus, yet it is scarcely ever acted upon except in pauper cases; and it is usual for such notices to be

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(*i*) Cir. Ord. 25th April, 1845.

(*j*) Cir. Ord. 3rd December, 1841, para. 1.

(*k*) Reg. XXVI., 1814, Sec. 14, Cls. 5, 6.

(*l*) Reg. XXVIII., 1814, Sec. 7; Cir. Ord. West. C. 26th July, Cal. C. 1st November, 1833; Cir. Ord. S. B. of Rev. 29th May, 1847; S. D. 1849, November 6th, p. 423.

served by the Officers of the Court, in the manner already mentioned.(*m*)

No person, other than a peon duly registered, can be employed by the Moonsiff upon this service, without a special order to that effect, recorded by the Moonsiff, and also endorsed on the process.(*n*)

Service on agent of defendant.

If the defendant has an agent at the place where the Court is held, expressly empowered, either by a clause in his general mooktarnamah, or by a separate mooktarnamah granted for the purpose, to receive on behalf of the defendant any judicial process which may not be especially ordered to be served personally, by an Officer of the Court; the notice is tendered to such agent, on behalf of his principal; and the agent's acknowledgment endorsed upon it, is accepted as a sufficient proof of service.(*o*)

On defendant within the jurisdiction.

Where the defendant has not an agent upon the spot, or has not expressly authorized his agent to receive such notices, or where the agent declines to receive the notice; if the defendant be resident within the jurisdiction of the Court, it is served on him through the Nazir of the Court, by a chuprassie or peon; who requires the acknowledgment of the defendant, to be endorsed upon it, or if he be absent from his usual residence, the acknowledgment of his principal agent, or of any person acting for him during his absence. If the defendant be resident within the jurisdiction of a different Court, the notice is transmitted to the Judge of that Court, who causes it to be served in the same manner.(*p*)

On defendant in another zillah.

On defendant beyond reach of the Civil Courts.

If the defendant is not resident within the jurisdiction of any of the Civil Courts of the East India Company, and if the suit is cognizable by the Court in which it has been instituted; either, (in claims to land or other immovable property) from

(*m*) Reg. XXIII., 1814, Sec. 19, Cl. 1; Reg. VII., 1832, Sec. 5, Cl. 1; Cir. Ord. 28th August, 1840; Con. 861, West. C. 7th February, Cal. C. 28th February, 1834.

(*n*) Cir. Ord. 28th August, 1840.

(*o*) Con. 512, 17th July, 1829.

(*p*) Reg. II., 1806, Sec. 2, Cl. 2. See Con. 701.

the property claimed being within the jurisdiction of the Court; or, (in other cases,) from the cause of action having arisen within its jurisdiction; the notice, where the suit is for land or other immovable property, is served upon the defendant's agent or representative in charge of the property; and in other suits it is the duty of the Judge to cause notice of the claim to be conveyed to the defendant in such manner as may appear most certain and convenient, according to the circumstances of the case.(q)

On defendant within jurisdiction of Supreme Court.

When the defendant is resident within the jurisdiction of the Supreme Court, service is effected in the manner mentioned below.

Service on persons of high rank.

It seems that in the case of some few persons of high rank, the notice is transmitted with a letter addressed by the Judge to the defendant, but it must be obeyed even when this ceremony is omitted and when it is served in the usual manner.(r)

Tulubanah is allowed, with reference to the computed distance of the place where the process is to be served, from the station of the Court, and the peon is prohibited from receiving any other remuneration:(s) he is paid for the number of days required for going and returning, (allowing ten miles for a day's journey) and for two days in addition for service of every subpœna, process of arrest, and process of attachment, and one day in addition for service of every other description of process.

Acknowledgment by defendant of the service.

In the execution of the process of all Courts, the person through whom the notice to appear and answer may be served, requires from the defendant a written acknowledgment, to be endorsed on the notice, signifying that it has been duly served upon him: he causes some of the defendant's neighbours, or any mundul or putwaree or other principal inhabitant of the village, or the mohulleedar of the ward, to witness

Attestation by neighbours.

(q) Reg. II., 1806, Sec. 2, Cl. 3.

(r) See R. S. C. 29th December, 1840, p. 51.

(s) Cir. Ord. 4th February, 1842; Cir. Ord. 11th March, 1842.

the due execution of the service, and he states in his report the name or names of such witness or witnesses. His own single evidence is not sufficient to prove the service of process when any adverse steps are to be founded upon the defendant's disregard of it.(*t*)

Service on persons in Salt and Opium Departments.

When the defendant is a person employed in the provision of Salt and Opium, the notice is enclosed in a sealed cover addressed to the Agent, or to the Assistant, or to the Gomastah, Ameen, or head Officer of the nearest aurung, kotee, or chowkee subordinate to them. The Officer causes the notice to be duly served and acknowledged by the defendant and returns it to the Court whence it issued.(*u*)

Execution of process in another district within the zillah.

Where a defendant in a suit pending before one Moonsiff resides in the division of another Moonsiff, within the same zillah, the process ought to be endorsed by the Moonsiff in whose division the defendant resides;(*v*) and so it is in the case of the Ameen or Principal Sudder Ameen where it is necessary that process should be executed in a different zillah from that in which it issues, the Zillah Judge or subordinate Judge issuing the process, sends it under his seal and signature to the Judge of the zillah in which it is to be enforced, and the latter Officer gives directions accordingly.(*w*)

In a different zillah.

Appearance.

The notice having been served upon the defendant, he must, in obedience to its requisition, appear in Court, either in person or by Vakeel or Agent; the Court then fixes a day, according to its discretion, for him to answer the complaint and it may at any time allow him, if it thinks fit, a further period for delivering his answer. The defendant of course provides himself with a copy of the plaint.(*x*)

Answer.

(*t*) Reg. XXIII., 1814, Sec. 19, Cl. 3; Con. 773, West. C. 4th April, Cal. C. 3rd May, 1833.

(*u*) Reg. XXIII., 1814, Sec. 20.

(*v*) Con. 701, Cal. C. 6th July, West. C. 17th August, and 26th October, 1832, para. 3.

(*w*) Con. 1235, West. C. 19th July, Cal. C. 9th August, 1839.

(*x*) Reg. IV., 1793, Sec. 5, Benares; Reg. VIII., 1793, Sec. 2, Ced. and Conq. Prov.; Reg. III., 1803, Sec. 5.

Mode of computing time for the performance of acts judicially required.

In order to secure uniformity in calculating the period within which an appeal should be lodged or any official act should be done, it has been settled(y) that when the period consists of days or weeks, the full number of days or weeks mentioned in the order should be allowed, exclusive of the day on which the order is passed; and that when a month or a year is mentioned, the month or the year should be reckoned according to the English calendar.

SECTION II.

COURSE TO BE PURSUED WHEN DEFENDANT EVADES SERVICE.

Course to be pursued when defendant evades service.

If a defendant, to whom the usual notice has been issued from any Court, of whatever rank, absconds; or is not, after diligent search, to be found; or shuts himself up in any building, or retires to any place, so that the notice cannot be served upon him; or if (in the case of Moonsiff's process) the defendant shall refuse to give the required written acknowledgment; the Court,—on receiving a return to this effect from the Nazir or other person entrusted with the service of the notice, with the addition of a certificate of what has occurred, written on the back of the process by the person entrusted with its execution and verified by the signature of some mundul or such other person as abovementioned,(z)—affixes in a conspicuous part of the Court-room a proclamation written like the notice, in the current language of the country.

Proclamation.

The proclamation contains a copy of the notice, and an intimation, that if the party does not appear on a day named (being not less than 15 days from the date of affixing the proclamation) the Court will proceed without further notice to try and determine the cause without his appearance or answer.

(y) Cir. Ord: 1st March, 1844.

(z) Reg. II., 1806, Sec. 2, Cl. 3; Ibid; Sec. 3, Reg. IV., 1793; Sec. 11, Reg. III., 1803; Sec. 13, Reg. XXIII. 1814, Sec. 22.

In the Court of

To Sheik Edoo, of

Whereas Ramdhun, of has instituted a suit against you in this Court for the recovery of rupees; and whereas a notice was duly issued, requiring you to attend and to deliver answer to the plaint on or before the 22nd day of April 1841; and whereas it appears from the return of that after diligent search, you were not to be found and that the said notice was not served upon you according to the exigence thereof: Proclamation therefore is hereby made agreeably to Regulation II., 1806, that if you do not appear in person or by Vakeel on or before the 15th day of May 1841, the Court will proceed to try the cause *exparte*, and give judgment as if you had appeared, and answered to the plaint.

Given under my hand and the seal of the Court, this 25th day of April 1841.

(L. S.) A. B., *Judge,*

or Principal Sudder Ameen, Sudder Ameen or Moonsiff.

A copy is affixed on the outer door of the house in which the defendant has usually dwelt,(*a*) or in some conspicuous spot in the village or other place where he has generally resided. The Nazir returns it with an endorsement stating when and where it has been fixed up.

The Moonsiff, previously to trying a cause *exparte*, must make such enquiries of the person who served the process, and of the witnesses, as may satisfy him that the notice was duly served.(*b*)

The other Courts are not required to make these enquiries of the witnesses.

If the defendant appears within the period fixed by the proclamation, the Court gives him time to file his answer.(*c*)

(*a*) S. D. 1849, 20th December, p. 475.

(*b*) Reg. XXIII., 1814, Sec. 21, Cl. 2; Con. 775, West. C. 4th April, Cal. C. 3rd May, 1833.

(*c*) S. D. 1850, 18th March, p. 56.

BENGAL SECRETARIAT

SECTION III.

DEFAULT AFTER PROCLAMATION.

Where defendant makes default, after service or after proclamation cause tried *exparte*.

If the defendant does not appear in person or by Vakeel, by the time limited in the proclamation; or if a defendant, who has been served with the usual first notice, does not appear in person or by Vakeel, within the time specified; or if, having appeared, he refuses to answer the plaint, or makes other default, the Court proceeds to try the cause *exparte*, and after examining the allegations of the plaintiff only, and the depositions of his witnesses, gives judgment in the same manner as if the defendant had appeared, answered and entered into proof. It cannot decree in favour of the plaintiff unless he substantiates his case by evidence.(*d*)

Defendant permitted to appear and make defence.

If a defendant, who has made default, appears at any time before the decision of the suit, and assigns satisfactory reasons to shew that the default was not wilful, he is permitted, notwithstanding the commencement of an *exparte* investigation, to file his answer, and to adduce evidence in support of it, if the merits of the case appear to require it.(*e*)

If the notices have been duly served, it is no excuse for a woman of rank to say that she was ill when they were served, and that she had no intimation of the suit having been brought against her.(*f*)

Where the defendant is not resident within the jurisdiction of any of the Civil Courts of the East India Company, if the claim is for land or other immovable property within the jurisdiction of the Court, and the usual notice has been served upon the defendant's agent or representative in charge of the property; the case may be disposed of *exparte*, on the default of the defendant.(*g*)

(*d*) Cir. Ord. Cal. and West. C. 24th September, 1832.

(*e*) Con. 375, 4th February, 1825.

(*f*) S. D. 1848, 25th May, p. 473.

(*g*) Reg. II., 1806, Sec. 2, Cl. 3; Con. 956, West. C. 12th June, Cal. C. 10th July, 1835.

Where the defendant is not resident within the jurisdiction of any of the Civil Courts of the East India Company, and the suit is not for land or other immovable property, but has been duly instituted in the Court within whose jurisdiction the cause of action arose; if the usual notice of the claim has been conveyed to the defendant, the cause may be proceeded with *exparte* on his default, and if he has any property, real or personal, within the jurisdiction of the Court (or of any other Civil Court of the East India Company) it may be made available, by attachment or otherwise, as if the defendant were within the jurisdiction.(*h*)

But until the notice has been served upon such defendant, no step can be taken in the suit, whether the defendant has or has not property, real or personal, within the jurisdiction.(*i*)

Regulation II., 1806, Section 2, Clause 3, imposes upon the Judge the duty of causing notice of the claim to be conveyed to defendants who do not reside within the jurisdiction of any Civil Court of the East India Company, and does not provide for cases in which it may be deemed impossible to convey such notice.

It appears, however, to have been ruled by the Sudder Court, on a reference from a Zillah Judge, as to whether a suit could be carried on against a party who had proceeded to England, that "a cause cannot be tried *exparte* when it is known that the usual notice has not and cannot be served on the defendant." From this it may be inferred that the Court considered it impossible to serve the usual notice upon a defendant in England.(*j*)

It has been already stated that every Court can take cognizance of a suit for immovable property lying within the local limits of its jurisdiction, and being of the requisite value. In other cases, it is not material, in determining whether a suit be cognizable by a particular Court, to inquire

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(*h*) Reg. II., 1806, Sec. 2, Cl. 3.

(*i*) R. S. C. 7th November, 1842, p. 40.

(*j*) Con. 1343, Cal. C. 20th May, West. C. 17th June, 1842.

whether the defendant has property of any kind within the local limits of the Court's jurisdiction, or within those of any Court of the East India Company. The question must be decided according to the general rules above laid down.

If the claim be in itself cognizable under the general rules on this subject, it may still not be worth while for the claimant to sue an absent man who has no property which can be taken in execution; and therefore it may be expedient to enquire whether he has any property within reach of the Court's process: but his having such property does not give jurisdiction to the Court, and his being without such property does not bar its jurisdiction.(*k*)

SECTION IV.

SECURITY FOR APPEARANCE OF DEFENDANT.

Security not generally required.

If a defendant, after receiving the usual notice, or after proclamation, attends in person or by Vakeel, and delivers his answer to the plaint, he is in general allowed to defend the cause, to its determination, without being called upon to give any security in respect of it.

Where security is required for defendant's appearance.

But if the Judge (of whatever grade) is satisfied, by sufficient proof, that there is reason to believe the defendant intends to abscond, and withdraw himself from the jurisdiction of the Court, he may, either on the institution of the suit or at any time whilst it is depending in his Court, issue process against the defendant requiring him to give security for his appearance.(*l*)

(*k*) Chapter XV. supra. N. B. in Con. 854 (31st January 1834) there is some confusion of language on this subject; but as the Court directed the cause to be proceeded with in the manner laid down in Secs. 2 and 3, Reg. II., 1806, it clearly did not contemplate that any steps would be taken till the essential preliminary of service on the defendant had been complied with.

(*l*) Reg. II., 1806, Sec. 4; Act VI., 1843.

The process is in the following form:

Warrants for security to be furnished by a defendant, are in the following form.

To Mohumud Ally, Nazir of the Court of

Whereas Moonshee Khyroollah has instituted a suit in this Court against John Smith for the recovery of twelve hundred rupees; and whereas the said Moonshee Khyroollah has satisfied the Court by sufficient proof, that the said John Smith intends to abscond and to withdraw himself from the jurisdiction of the Court; you are therefore hereby authorized and required to demand good and sufficient security in the sum of fifteen hundred rupees from the aforesaid John Smith for his personal appearance before this Court, and in the event of the said John Smith not giving good and sufficient security as aforesaid, you are further authorized and commanded to take the said John Smith into custody and to bring him before this Court.

Given under my hand and the seal of the Court, this 10th day of May 1841.

(L. S.) A. B., *Judge,*

or Principal Sudder Ameen or Sudder Ameen or Moonsiff.

How served.

The summons is served by the Officers already mentioned as employed in serving notices. In the event of the defendants not giving the required security, the Officer is to take him into custody and bring him before the Court. The Nazir, &c., returns the summons on the day appointed with an endorsement specifying in what manner he has executed it.

Defendant committed till he gives security.

If the security is not given, the defendant is committed to close custody until it be given, or until the decree of the Court be complied with; or until an attachment of property shall have taken place, to secure the execution of the ultimate judgment in the cause.(*m*)

Amount fixed by Judge.

The Judge in the first instance demands from the defendant such security only, as may seem necessary to secure his

(*m*) Reg. II., 1806, Sec. 4; Reg. IV., 1793, Sec. 5; Reg. III., 1803, Sec. 5; Act VI., 1843. See the next Section as to confinement of the person by uncovenanted Judges, infra, Chapter XXXI.

appearance during the trial of the suit, and the amount fixed by the Judge is stated in the process. But if, in the course of the proceedings, the security so taken appears to the Judge to be insufficient, he may take such further security as he thinks necessary to ensure the appearance of the defendant. He exercises his own discretion as to the sufficiency of the sureties who may be tendered to him; the Nazir is the Officer who inquires into their sufficiency.(*n*)

Where defendant is exempt from bailable process.

This rule does not apply to defendants who are not, at the time of issuing the process just mentioned, within the limits of the district in which the suit against them was instituted. Such persons cannot be arrested in another district, but if they fail to appear and defend the suit it is decided *exparte* in the original Court.(*o*) But if they were within the jurisdiction when the process was taken out, they may be arrested wherever they are found; the warrant being backed, of course, by the proper authorities of the place in which the arrest is made.(*p*) A person arrested for default in giving security is committed to the jail of the zillah, and it is illegal to suffer him to remain out of gaol, merely placing peons over him.(*q*)

Form of security bond.

An instrument to the following effect, is executed by the sureties.

Whereas a suit has been instituted in the Court of by plaintiff against defendant; and whereas I inhabitant of have voluntarily become security for the appearance of the said defendant to answer to the above suit, and perform all such orders as may be passed thereupon, until the final decree on it shall have been carried into execution; I do therefore hereby engage and bind myself, my heirs and successors, that the

(*n*) Reg. III., 1802, Sec. 2; Reg. II., 1806, Sec. 4.

(*o*) Con. 888, Cal. C. 4th, West. C. 25th July 1834.

(*p*) R. S. C. 21st April, 1845, p. 67, 2 Sev. Rep. 209.

(*q*) 2 Sev. Rep. 209.

said defendant shall appear in person, or by Vakeel, to make answer to the plaint against him in the suit aforesaid on being the day on which his appearance has been required in the said Court; and further that the said defendant shall personally attend at the Court, whenever the same may be required by the Judge thereof, at any time whilst the above suit is depending before the Court, or Court of Sudder Dewanny Adawlut; or before the final decree which may be passed thereupon by the above Courts respectively, shall be fully and completely carried into execution; in default of which and in the event of my not producing the said defendant when called upon, I will be answerable for such sum as may be adjudged against him; and for the performance of whatever order or decree may be passed against him on the suit abovementioned.(r)

Consequences of default after giving security.

Remedy against sureties.

If a defendant, after giving security, does not appear; or having appeared, refuses to answer, the plaintiff may sue the sureties on their engagement, and recover from them whatever is found due to him from the defendant; or he may proceed against the defendant as defendants are proceeded against who have been served with a summons, and have not appeared, or have refused to answer.(s)

But in the latter case it is conceived that he is only entitled to take out execution against the defendant and his property, and not against the sureties: as they have no opportunity of contesting the justice of the plaintiff's original claim.

The surety is not relieved from his liabilities until the final decision of the cause by the Court of appeal—if there be an appeal, even although the lower Court may have passed an order discharging him from responsibility.(t)

Party failing to give security not allowed to defend.

A party failing to furnish security when called upon, is not permitted to file his answer by Vakeel, or to defend the suit:

(r) Reg. XI., 1797, Sec. 3, Cl. 1.
(s) Reg. IV., 1793, Sec. 12.
(t) R. S. C. 9th Dec., 1840, p. 50.

and until the defendant gives security or delivers himself up, the Judge will not act upon such answer, though tendered to him.(*u*)

Deposit in lieu of security.

When security is demandable from a party, and he tenders a deposit of money or promissory notes, or other obligations of Government, or any other sufficient pecuniary security, to the amount required, such deposit is accepted instead of securities for his appearance and is kept by the Treasurer of the Court; to be restored, or disposed of as the Court may direct, on the termination of the cause or whenever the purpose, for which the deposit is made, shall have been accomplished.(*v*)

Native woman of rank.

Where the defendant is a Hindoo or Mahomedan woman of rank, who cannot, according to the customs of the country, appear in a Court of Justice, the Judge does not issue any compulsory process against her, but he issues a summons requiring her to appear in Court in person or by Vakeel, at a certain time, and to answer to the complaint and abide by the orders which the Court may pass.(*w*)

Guardian appointed by Court of Wards.

Where a guardian appointed by the Court of Wards is sued jointly with his ward, the securities required by the Regulations to be taken from parties in suits are not demanded of the guardian.(*x*)

Security given before the suit no excuse.

If the plaintiff is entitled, upon the grounds abovementioned, to an order enquiring the defendant to give security for his appearance, the latter must give security accordingly, in that suit; although he may, before the institution of the suit, have given security to the plaintiff for the discharge of the same trust or the payment of the same debt, upon which the suit is founded.(*y*)

(*u*) R. S. C. 5th May, 1845, p. 68.

(*v*) Reg. II., 1806, Sec. 8.

(*w*) Reg. IV., 1793, Sec. 13.

(*x*) Reg. X., 1793, Sec. 32; Reg. LV., 1795, Sec. 2.

(*y*) R. S. C. 16th January, 1843, p. 45; 2 Sev. Rep. 209.

SECTION V.

ATTACHMENT OF PROPERTY TO SECURE EXECUTION OF DECREE.

In what cases security is required.

If the Judge be satisfied by sufficient proof, (which must rest on some open act (*z*) of the defendant, established by something more than the mere oath of the plaintiff,(*a*) that there is ground to apprehend that the defendant means to dispose of the property in his possession by any private transfer; or to cause the public sale of any disputed land; by withholding the assessment upon it; or to remove any personal property from the jurisdiction of the Court, whilst the suit against him is depending; for the purpose of avoiding the execution of an eventual judgment against him; the Judge calls upon the defendant for security, in such sum as may appear sufficient to make good the ultimate judgment of the Court. It is essential that a reasonable time should be allowed for procuring the requisite security.(*b*) This kind of security is called malzaminy; the bail which is given for a party's personal appearance is called hazirzaminy.

The defendant may, if he pleases, make a deposit to the amount required in like manner as when bail is required for his personal appearance.

Attachment of property.

Should the required security not be given and such deposit not be made, within the appointed time, the Judge is authorized at the expiration of the time,(*c*) on these grounds (namely, proof of intention to alienate, and refusal or neglect to give security) (*d*) to cause the attachment or sequestration of any land, effects or other property belonging to, or possessed by,

(*z*) Rep. Sum. Cases, 31st August, 1841, p. 16.

(*a*) Con. 588, 8th April, 1831, para. 3.

(*b*) R. S. C. 21st November, 1834, p. 2.

(*c*) R. S. C. 21st November, 1834, p. 1.

(*d*) Con. 190, R. S. C. 31st August, 1841, p. 16.

the defendant, whether Native or European,(*e*) to the amount or value of the cause of action in the suit depending; or the attachment of which may be deemed necessary to secure the execution of the judgment to be passed in the cause.(*f*)

An attachment made merely because the defendant has no other property than that which is in dispute, or made in the absence of any one of the conditions abovementioned, is illegal.(*g*)

The writ of sequestration runs as follows:

WRIT OF SEQUESTRATION.

To Mohumud Ally, Nazir of the Court of

Whereas Sheik Syfoo has instituted a suit in this Court against Ram Sohaee Singh for the recovery of ten thousand rupees; and whereas the said Sheik Syfoo has satisfied the Court by sufficient proof, that he has just ground to apprehend that the said Ram Sohaee Singh means to dispose of his property while the suit against him is pending, for the purpose of avoiding the execution of an eventual judgment against the said Ram Sohaee Singh; you are therefore hereby authorized and required to demand good and sufficient security from the aforesaid Ram Sohaee Singh in the sum of twelve thousand rupees to make good the ultimate decision of the Court, and in the event of the aforesaid Ram Sohaee Singh not giving good and sufficient security within the period of twenty-four hours, you are hereby further authorized and commanded to attach and sequestrate any lands, goods and effects, or other property belonging to or possessed by the said Ram Sohaee Singh to the amount of twelve thousand rupees, and to hold the same under attachment and sequestration until a final decision be passed by this Court.

Given under my hand and the seal of the Court, this 15th day of June 1841.

(L. S.) A. B., *Judge,*

or Principal Sudder Ameen or Sudder Ameen or Moonsiff.

(*e*) Con. 588, 8th April, 1831, para. 2.

(*f*) Reg. II., 1806, Sec. 5, Cl. 1.

(*g*) R. S. C. 27th September, 1847, p. 120.

What may be attached.

It seems that there is no kind of property exempt from attachment.(*h*)

Thus, attachment has been held to be applicable to promissory notes when found in the name of the defendant in the action, or endorsed to him,(*i*) to the profits of a jaghire(*j*) to the surplus proceeds of a sale for arrears of revenue, in deposit in a Collector's office(*k*) to a share in shops and mercantile establishments (in which case, however, the Court effects the attachment simply, by the issue of notices forbidding the alienation of the share,(*l*) and it is not confined to property situated within the jurisdiction of the Court in which the suit may be pending.(*m*)

Process must be peaceably executed.

Process of attachment must be executed without violence; and an Officer who has entered upon the enclosed ground surrounding the house of the defendant, is not authorized to break open an outer door of the house, in order to serve the process.(*n*)

Attachment how made.

The written order of the Court, directing the attachment is read and proclaimed upon the spot where the property is situated, and is affixed there in some conspicuous situation; after which any private alienation of the property sequestered, whether by sale, gift or otherwise, during the continuance of the attachment, is illegal and void; and any removal of the property so attached, with a view to oppose or evade the sequestration, is punishable, as an act of resistance to the process of the Court.(*o*)

Effects of attachment.

Legal effects of attachment.

Lands attached under these circumstances are protected (so far as is necessary for the purposes for which they have been attached) against subsequent seizure by the Sheriff of Calcutta, in the same manner as lands which have been attached for sale in execution of a decree.(*p*)

(*h*) See infra, Chap. XXVIII. Sec. 2.

(*i*) R. S. C. 28th February, 1846, p. 76.

(*j*) R. S. C. 5th November, 1834, p. 1.

(*k*) R. S. C. 18th April, 1842, p. 28.

(*l*) R. S. C. 25th May, 1847, p. 102.

(*m*) Con. 665, 6th January, 1832.

(*n*) Con. 745, 21st December, 1832.

(*o*) Reg. II., 1806, Sec. 5, Cl. 2.

(*p*) Cir. Ord. 17th February, 1816, No. 50; Con. 916, Cal. C. 21st November, West. C. 19th December, 1834; Infra, Chap. XXVIII.

Applications to a Civil Court for attachment of property lying within the limits of another jurisdiction, are—when the Court is satisfied that they ought to be complied with,—transferred to the Judge of the district, in which the property is situated, and all proceedings and incidental investigations consequent thereon, are conducted by him (or by his subordinate judges on reference from him,) as they would have been conducted by the Court issuing the process, had the property been situated in its own jurisdiction.(*q*)

Attachment does not oust the defendant from his possession.

Attachments made for the purposes which have been mentioned, have not in general the effect of removing the defendant or his representative from the possession and management of the land, or other property attached, until a decision be passed in the cause; nor do they preclude any act of the defendant or of his local representative, relative to such property, which may be consistent with the object of the attachment.(*r*)

Where defendant is divested of management of land.

But if there exist any special cause (which cause must be recorded on the proceedings of the Court,) or if the suit be for landed property of considerable value, and one wherein it appears necessary, for the purposes of justice, to divest the defendant of the management of the land until the suit be decided, or malzaminy security be given, the attachment is made through the Collector of the district.(*s*)

It cannot be made by the Court itself, through any of its officers, nor through an ameen, not even where the attachment has been induced by a private arrangement between the parties to the suit.(*t*)

Precept to Collector.

The Court issues a precept to the Collector, stating specifically the property which is to be attached, and directing him to hold the estate in attachment, (whether it be rent-free land or land paying revenue to Government,(*u*) and to appoint a

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(*q*) Cir. Ord. 83, 8th May, 1840; Cir. Ord. 167, 24th September, 1841; Cir. Ord. 8th September, 1843.

(*r*) Reg. II., 1806, Sec. 5, Cl. 2.

(*s*) Reg. II., 1806, Sec. 5, Cl. 2; Reg. V., 1798, Sec. 6; Reg. IV., 1803, Sec. 12.

(*t*) Con. 752, 1st February, 1833.

(*u*) Con. 1039, Cal. C. 19th August, West. C. 26th September, 1836.

person for the due care of it under adequate security for the faithful discharge of the trust. If, however, any person interested in the estate is dissatisfied with the selection made by the Collector, or with the conduct of the manager after his appointment, such person may represent his objections to the Board of Revenue, which will, at its discretion, either confirm the manager chosen, or order the Collector to appoint another.(*v*)

The Civil Court cannot interfere with the management of property attached under its own orders by the Collector.(*w*)

A manager, or receiver of the rents, of lands under attachment, is not competent to grant leases which shall be binding upon the proprietor when the attachment is withdrawn.(*x*)

The Civil Courts are competent to order the revenue authorities to attach a portion of an estate.(*y*)

In such cases the entire estate is exempted from sale for arrears of revenue until after the close of the year.

If there be more heirs than one to the estate of a person dying intestate, and they can agree amongst themselves in the appointment of a common manager, they are at liberty to take possession; and the Courts of Justice are restricted from interference, unless a regular suit be instituted.(*z*)

But if the right of succession to the estate be disputed between several claimants, one or more of whom may have taken possession, the Judge, on a regular suit being preferred by the party out of possession, takes good and sufficient security from the parties in possession for their compliance with the judgment that may be passed in the suit; or, in default of such security being given within a reasonable period, he may give possession, until the suit be determined, to the

(*v*) Reg. V., 1827, Sec. 3.

(*w*) R. S. C. 1st January, 1842, p. 22; R. S. C. 16th March, 1847, p. 93.

(*x*) S. D. 21 March 1850, p. 62.

(*y*) Reg. II., 1806, Cl. 2, Sec. 5; letter No. 1138, 11th July 1845, from Register of Sudder Dewanny Adawlut, to Judge of Cuttack; Cir. Ord. Sud. Bd. Rev. 3rd August, 1846; Act I., 1845, Sec. 10.

(*z*) Reg. V., 1799, Sec. 4, Ced. and Con. Prov.; Reg. III., 1803, Sec. 16, Cl. 4.

other claimant or claimants who may be able to give such security. The Judge declares at the same time that such possession is not in any degree to affect the right of property at issue between the parties: but is to be considered merely as an administration to the estate for the benefit of the heirs, who may, on investigation, be found entitled to succeed thereto.(*a*)

The provisions of this enactment apply only to cases of disputed succession among heirs at law, and not to those of parties claiming on special grounds; as where the plaintiff is not the natural heir, but claims the inheritance on the ground of an adoption, which is denied by the opposite party.(*b*)

When the Judge has satisfied himself, by a summary inquiry, as to the real value of the property sued for; (hearing of course what the defendant may have to urge against the valuation of the plaintiff) it is his duty to demand security according to the amount so ascertained: but it is irregular to demand security at once, without this preliminary investigation.(*c*)

Case to be speedily tried.

Whenever property is attached under the provisions just stated, the trial of the cause is proceeded with and brought to a conclusion, as speedily as possible, without regard to the time of its institution, and although there may be other causes above it in the list.(*d*)

Attachment withdrawn on security being given.

The attachment is taken off on the delivery of sufficient malzaminy security, at any time previous to the decision of the cause in the Zillah Court.(*e*)

No attachment can be withdrawn by the Collector without a further precept from the Court to that effect.(*f*)

Claims for rent take precedence of attachment.

If a putnee talook has become liable to sale for arrears of rent due to the zemindar, the sale cannot be stayed but by payment of the rent due; and the circumstance that the pro-

(*a*) Reg. V., 1799, Sec. 4, Ced. and Con. Prov.; Reg. III., 1803, Sec. 16, Cl. 4; R. S. C. 3rd July 1845, p. 69; 2 Sev. Rep. 195.

(*b*) R. S. C. 26th May, 1847, p. 102.

(*c*) 2 Sev. Rep. 195.

(*d*) Reg. II., 1806, Sec. 6.

(*e*) Reg. II., 1806, Sec. 6.

(*f*) Reg. V., 1827, Sec. 4.

perty is under attachment by the Civil Court, makes no difference.(*g*)

SECTION VI.

EXECUTION OF PROCESS WITHIN THE LIMITS OF THE SUPREME COURT.

PROCESS issued by any Court, of whatever rank, in the territories beyond the local limits of the Supreme Court of Calcutta, may be executed within those limits in manner following:

A copy of such process, authenticated by the attestation of the Court, issuing the same, and accompanied by a certified translation in the English language, is forwarded to the address of the Deputy Sheriff of Calcutta, either by post, or by the hands of a peon or other public officer, as may be most convenient, with a letter in which the Deputy Sheriff is requested to lay the process before the Judges of Her Majesty's Court. The Deputy Sheriff lays the writ before a Judge of the Supreme Court, who may thereupon, endorse and direct the same to be executed, within the local limits of his Court by the Sheriff, or if he finds it defective in any matter of form, may remit it for amendment to the authority by which it was issued.(*h*)

Execution of process within jurisdiction of SupremeCourt.

The names of the parties for and against whom respectively the process may be issued, are inserted in the writ; and not merely the names of the firm or company under which the respective parties may be associated for trade or business, except when any company may be empowered by a special law to sue or be sued in the name of an officer of their society.(*i*)

Executed by Sheriff.

Upon the delivery to the Sheriff, of the process so endorsed, that officer makes a memorandum of the date of delivery,

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(*g*) R. S. C. 20th September, 1844, p. 61.

(*h*) Act XXIII., 1840, Sec. 1; Cir. Ord. 1st March, 1841.

(*i*) Cir. Ord. 30th May, 1845; Supra, p. 4.

and executes the process as if it had originally issued from the Supreme Court and had been delivered at the date noted by him; and he makes no distinction, as to priority or otherwise, between its execution, and that of any process originally issued from the Supreme Court; but all writs, warrants and other process, whether original or endorsed as aforesaid, are subject amongst themselves to the same rules, touching the mode and order of execution, as are established in respect of process originally issued from the Supreme Court.(*j*)

The Sheriff's liabilities and responsibilities in respect of such process, and the effect of the process upon all persons(*k*) and property and the consequences of disobeying or obstructing the execution of such process, and the rules touching expenses and other matters where the process is for the attendance of witnesses, are precisely the same as if the process had issued originally from the Supreme Court.(*l*)

Attachment of person.

In the case of persons seized or detained by virtue of any process executed within the limits of the Supreme Court by the Sheriff, it is the duty of the Sheriff, if so required by the endorsement of the Judge, to deliver the party in custody to such authority or persons as shall be particularly specified in such endorsement, and who shall have been charged with the execution of the process by the authority originally issuing the same, and for that purpose to cause the party in custody to be conveyed to any place within the Company's territories beyond the local limits of the jurisdiction of Her Majesty's Court.(*m*)

Judge may direct bail to be taken.

In the case of any process which may be required to be endorsed for the seizure or detention of any person, the Judge endorsing the process may direct by his endorsement that bail (the amount and number of sureties to be specified in such endorsement) may be taken; and for this purpose he may call for such documents and make such enquiry as he shall think proper.(*n*)

(*j*) Act XXIII., 1840, Sec. 2.
(*k*) ——————, Sec. 3.
(*l*) ——————, Sec. 4.
(*m*) Act XXIII., 1840, Sec. 5.
(*n*) ——————, Sec. 7.

Any money which it may be requisite to send to the Deputy Sheriff is remitted by a bill on the General Treasury from the Collector of the district.(*o*)

All subordinate judicial officers submit the processes of their Courts, which may require execution under the authority of the Supreme Court, to the Zillah Judge, to be by him forwarded in the prescribed manner to the Deputy Sheriff.(*p*)

All process is drawn up agreeably to the forms appended to the Act XXIII., 1840, by which this mode of execution was established; or agreeably to such other forms as may, from time time, be circulated by the Sudder Court.(*q*)

The party at whose requisition any witness may be summoned, must be prepared to pay to the witness such sum for his expenses as the Judges of the Supreme Court may consider reasonable and proper.(*r*)

SECTION VII.

RESISTANCE OF PROCESS.

Resistance by person not holding land.

If any person,—not being a zemindar, independent talookdar or other actual proprietor of land, or a dependent talookdar, or a farmer of land holding a farm immediately of Government,—resists, or causes to be resisted, any process, rule, order or decree of Court; the Court, on proof of the resistance being made by oath to its satisfaction, summons him to answer to the charge. If he absconds or shuts himself up in any building, or retires to any place so that he cannot be served with the summons, the Court proceeds against him in the manner directed with regard to other persons absconding, or otherwise acting as above specified,(*s*) so that they cannot be served with the process of the Court. If he does not

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(*o*) Cir. Ord. 1st March, 1841, para. 2.
(*p*) ——————, para. 3.
(*q*) ——————, para. 4.
(*r*) Cir. Ord. 1st March, 1841, para. 5.
(*s*) Supra, p. 155.

appear within the prescribed period, or if he appears and the Court, after receiving his answer, and hearing the evidence which he may adduce, considers the charge to be proved against him; he is adjudged to pay such fine to Government as the Court thinks proper upon a consideration of his offence and of his situation in life.(*t*)

Persons summoned to answer a charge of resistance of process, are at liberty to answer the charge through a Vakeel, without appearing in person.(*u*)

If the person convicted does not prefer an appeal within the time prescribed for lodging appeals,(*v*) the Court levies the amount by the same process by which it is empowered to execute its decrees for sums of money(*w*) that is, either by sale of the property or by imprisonment of the person, of the individual upon whom the fine has been imposed.(*x*)

The Judge himself disposes of all common cases of resistance of civil process, and he has no right to call upon the Magistrate to enforce his order. He makes over to the Magistrate those cases which have been attended with acts of violence amounting to a breach of the peace.(*y*)

In the event of a legal arrest on a warrant issued from the Civil Court, and of a forcible rescue from the custody of its officers, the Magistrate, on proof of such rescue, is not empowered to order the Police forcibly to enter the house wherein the person rescued may be, and to apprehend and forward him to the Civil Court; but the Civil Court proceeds against him as in a case of resistance of process.(*z*)

(*t*) Reg. IV., 1793, Sec. 2, Benares; Reg. VIII., 1795, Sec. 8, Ced. and Conq. Prov.; Reg. III., 1803, Sec. 26.

(*u*) Con. 1216, West. C. 17th May, Cal. C. 7th June, 1839.

(*v*) Con. 780, Cal. C. 12th April, West. C. 10th May, 1833.

(*w*) Reg. IV., 1793, Sec. 25, Benares; Reg. VIII., 1795, Sec. 8, Ced. and Conq. Prov.; Reg. III., 1803, Sec. 26.

(*x*) Con. 1214, Cal. C. 3rd, West. C. 24th May, 1839; infra Ch. XXVIII.

(*y*) Con. 1033, 12th August, 1836; Con. 1209, Cal. C. 12th April, West. C. 3rd May, 1839.

(*z*) Con. 765, Cal. C. 8th March, West. C. 12th April, 1833.

When the Judge of one district is called upon to aid the process of a Court of another zillah, the practice is for him to back the same with his official signature, and to send one or more of the peons of his Court to aid in its execution; and in ordinary cases any resistance to such process is considered as a resistance to the process of the Court within whose jurisdiction it took place, and is cognizable as such by the Judge of that Court.(*a*)

Where the person resisting holds land.

If the person charged with resisting the process of the Court or with causing it to be resisted be a zemindar, independent talookdar or other actual proprietor of land, or a dependent talookdar; the Court proceeds against him in the first instance as against one who does not fall within any of these descriptions. If it considers the charge to be proved, it may either fine him under the rules already stated, or it may decree that he shall, from the date of the decree, forfeit his zemindary, talook, or other estate, in which the resistance may have been made; or if the resistance shall have been made out of the limits of his estate, the zemindary, talook, or other landed property that he may possess within the jurisdiction of the Court, the process of which has been resisted.(*b*)

Forfeiture of land.

A decree of forfeiture may form the subject of a regular appeal.(*c*)

If the cause be not appealed within the time limited for preferring appeals, the Court immediately, upon the expiration of that period, forwards a copy of its decree and proceedings to the Governor General in Council.(*d*)

If an appeal be received from the lower Court, and the Sudder Dewanny Adawlut confirm the decree, they immediately

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(*a*) Con. 1115, West. C. 24th November, Cal. C. 8th December, 1837.

(*b*) Reg. IV., 1793, Sec. 22; Reg. IX., 1799, Sec. 3, Benares; Reg. VIII., 1795, Sec. 2, Ced. and Conq. Prov.; Reg. III., 1803, Sec. 23, Cl. 1.

(*c*) Con. 198, 8th March, 1815.

(*d*) Reg. IV., 1793, Sec. 22; Reg. IX., 1799, Sec. 3.

transmit a copy of their decree and proceedings, and of those received from the lower Court, to the Governor General in Council.(*e*)

The Governor General in Council may either order the decree to be executed, or may commute the forfeiture for such fine as he thinks adequate to the offence. If the forfeiture be commuted, the Court, upon receiving notice, is to levy the fine by the process prescribed for enforcing decrees.

But until the Court receives notice either of the commutation of the forfeiture or of the confirmation of the decree by the Governor General in Council, the decree is not considered final and no steps are taken to enforce it.

Upon receiving notice of confirmation, the Court issues a precept, under its seal, requiring the Collector of the zillah to depute an Ameen with a proper establishment of officers to sequester the lands, and collect the rents and revenues; or if the lands be deemed too inconsiderable to bear the expense of an Ameen, the precept directs the Collector to order the nearest tehseeldar, or any other officer who may be employed under him in the business of the collections, to take charge of the lands.(*f*)

The lands cannot legally be sequestrated till the judgment of forfeiture has been confirmed.(*g*)

If the decree be confirmed, the Governor General in Council may either confer the rights which the offender possessed in the lands on his heirs, upon their agreeing to make good all sums due from him to Government on account of the lands and to pay the public revenue assessed upon them, or, if the property be a dependent talook, the revenue payable from it to the proprietor within whose estate it is situated; or he may order the lands to be disposed of at public sale, like lands sold in execution of decrees generally.(*h*)

(*e*) Reg. IV., 1793, Sec. 22; Reg. IX., 1799, Sec. 3.

(*f*) Ibid.

(*g*) Con. 22nd May, 1799.

(*h*) Reg. IV., 1793, Sec. 23, Benares; Reg. VIII., 1795, Sec. 6, Cl. 2, Ced. and Conq. Prov.; Reg. III., 1803, Sec. 24.

Farmer resisting process.

A farmer resisting process is subject to the same penalties as a resisting zemindar, but with this difference, that the Governor General in Council may either direct execution of a decree adjudging the lease of a farmer to be annulled, or may commute the forfeiture for an adequate fine, or if the offender shall not be desirous of being continued in his farm, the Governor General in Council may fine him, and compel him to retain the farm during the remainder of the lease, and may hold him and his surety responsible for the discharge of their engagements.

Forfeiture of lease.

If the lease of the offender be annulled, and a balance be due from him to Government at the close of the year in which the lease may be cancelled, both he and his surety are to be held responsible for the payment of it; and the Collector of the revenue of the zillah is empowered to proceed against them for the recovery of it in the manner prescribed in Section 20, Regulation XIV., 1793, for the recovery of balances due from farmers whose leases may be annulled under that regulation. The offender is permitted to sue the dependent talookdars, under-farmers, and ryots, for any arrears of rent or revenue that may be due from them to him on account of the period during which his lease remained in force.(*i*)

Cases of resistance to process are tried in the first instance by the Court whose process may have been resisted, (subject to the ordinary course of appeal) if competent to try the same; if not, a report should be made to the Zillah Judge, who will exercise his discretion in referring them to any other tribunal.(*j*)

(*i*) Reg. VII., 1793, Sec. 24, Benares, Reg., VIII., 1795, Sec. 8, Ced. and Conq. Prov.; Reg. III., 1803, Sec. 25, Cls. 1 and 2.

(*j*) Govt. Ord. 15th January, 1834, No. 4.

CHAPTER XVII.

HOW THE DEFENCE MUST BE COMMENCED.

WHEN the person complained against has read the petition of complaint, if he finds that the facts there stated are true, and also that the plaintiff is entitled to the relief which is demanded by the plaint, he ought of course to comply with the demand.

Should the defendant think proper to resist the claim, then if he is a privileged person he should avail himself of his privileges in the manner prescribed by the regulation by which his privilege is secured.(*h*)

Where the defendant is privileged.

Where a Collector is made a party in his official capacity, whether against law or not, he must, on being served with the prescribed notice, either defend the suit in the usual manner, (whatever may be the nature of the plea that he may put in, either denying the jurisdiction or otherwise) or take the consequences of allowing the cause to be tried *exparte*.(*l*)

Inhabitants of a foreign territory, who may desire to defend a suit, must, within six weeks of the date on which the usual summons is served on them, furnish security for costs, and this whether they do or do not hold lands or other property within the limits of the British territories;(*m*) in the same manner as is required of plaintiffs resident abroad, and subject to all the same consequences on default;(*n*) and the same rules apply to defendants as to plaintiffs in case of departure from the juris-

Where he lives in foreign territory.

(*h*) Supra, pp. 3, 5, 19, 20, 112.

(*l*) Con. 1192, West. C. 21st Dec., 1838, Cal. C. 18th January, 1839.

(*m*) Con. 1355, West. C. 5th, Cal. C. 25th August, 1842.

(*n*) Supra, p. 110.

diction before decree. These regulations do not apply in the case of pauper suitors.(o)

Where he is a pauper.

The defendant, if he is unable to defray the expense of litigation, must apply for the immunities of a pauper suitor.

Of obtaining permission to defend as a pauper.

In suits in which the amount or value of the thing claimed exceeds sixty-four Rupees, a defendant may, under certain circumstances, be admitted to plead as a pauper.

To obtain this privilege, he must appear either in person or by an authorized agent, before the Court in which the suit may be depending, in conformity with the rules prescribed for persons seeking permission to sue as paupers, and he must present a petition containing an exact schedule of the whole real and personal property belonging to him, and the estimated value of such property.(p) The Court then proceeds in the same manner as where a person desires to sue as a pauper,(q) except that there is no preliminary inquiry into the merits of the case. If upon examination the Court is satisfied that the petitioner is not possessed of sufficient property to defray the probable expenses of the suit, and that he can neither plead the suit in person nor prevail on any of the authorized pleaders of the Court to undertake the defence of the suit, the Court is empowered to grant to the petitioner the same advantages and facilities in the defence of the suit, as are allowed to pauper plaintiffs, and no security except for personal appearance is required from such defendant.(r)

The Zillah Judge alone can determine whether a defendant is to be admitted to plead as a pauper, or not, and without his sanction no subordinate Judge is authorized to receive an answer *in formâ pauperis* from a defendant.(s)

Of retaining a Vakeel.

The person complained against, if he is able to defend his rights, ought to retain a Vakeel in the usual way, in the

(o) Reg. XIV., 1829, Sec. 2, Cls. 1, 2, 3. See p. 111, Supra.

(p) Reg. XXVIII., 1814, Sec. 3.

(q) Ibid. Supra, p. 6. Sec. 16, Cl. 2.

(r) Ibid. Supra, p. 151, 109.

(s) Con. No. 949, Cal. C. 1st May, West. C. 5th June, 1835.

same manner as has been already noticed in the case of plaintiffs.(*t*)

If the plaintiff absent himself previous to service of notice on the defendant, or before the reply is filed, the suit cannot be proceeded with, and must be dismissed.(*u*)

(*t*) Supra, p. 196.

(*u*) Con. 870, West. C. 21st February, Cal. C. 27th March, 1834.

CHAPTER XVIII.

THE PLEADINGS.

SECTION I.

FORM AND CONDUCT OF THE PLEADINGS.

Answer.

THE defendant in the first instance files in Court his answer to the plaint. In this document he states his own case, sets forth his rights, denies such of the plaintiff's allegations as are untrue, or states the additional facts which he considers to make up the whole truth of the case, and to justify his own pretensions.

The answer ought not to contain any matter irrelevant to the suit, nor any terms of abuse or reproach against the character of the parties, or of any other persons.(*v*)

Replication.

When the answer has been put in, if it admits the justice of the plaintiff's demand, and submits to a decree accordingly, no reply to such an answer is required.(*w*) Where the answer is hostile, it is the duty of the plaintiff to reply to it on the next Court day, but he must not introduce in his reply any matter not contained in his petition of complaint. He must either acknowledge the answer of the defendant to be true, or he is simply and shortly to deny the truth of such of the statements in the answer as he intends to dispute, or he is simply to deny the truth of all the statements in the answer, or to deny the competency of the answer itself.(*x*)

(*v*) Reg. XXIII., 1814, Sec. 25, Supra, p. 121.

(*w*) R. S. C. 15th June, 1846, p. 80.

(*x*) Reg. IV., 1793, Sec. 5, Benares; Reg. VIII., 1795, Sec. 2, Ced. and Conq. Prov.; Reg. III., 1803, Sec. 5.

These rules apply to answers in the Moonsiff's Court, with this qualification, that if the answer be a simple denial of the matter of the plaint, no further pleading is necessary; but if the answer contain any plea or allegation which requires a positive reply on the part of the plaintiff in order to bring the matter in dispute to a distinct issue, or to which the plaintiff may be desirous of replying, he must file his reply on the next Court day.(*y*)

Within what time to be filed.

It is discretionary with the Judge to admit the plaintiff's replication after the next Court day, at any time within six weeks from the filing of the answer; but it cannot be received after the lapse of that period, unless the plaintiff has previously, upon special application, obtained an extension of time.(*z*)

In the event of two or more defendants filing their answers separately, the plaintiff, unless he obtain permission to the contrary, must reply to each within six weeks from the date of its presentation, otherwise he will incur the penalty of default.(*a*)

Where redress is sought against a public officer for acts connected with his official duties, the plaint is transmitted by the Judge to the Board of Revenue or other authority to which the officer is subordinate; and that authority decides (and is bound to decide without delay,) whether the Government shall itself afford relief, or shall leave the plaintiff to enforce his rights at law; and whether, in the latter case, the suit shall be defended by the Government as an action against Government, or shall be defended by the person himself who is complained of. Until the superior authority gives intimation of the cause which it intends to pursue, a plaint of this nature is regarded as a mere petition. If the intimation is, that the plaintiff is to be left to pursue his legal remedies, the suit is for the first time considered as actually instituted; and until then the plaintiff is not bound to take any further step. In a

(*y*) Reg. XXIII., 1814, Sec. 25.

(*z*) Act XXIX., 1841; Cir. Ord. 2nd July, 1845.

(*a*) R. S. C. 23rd September, 1845, p. 71.

suit, therefore, of this kind, which as finally constituted is a suit against the Government along with other defendants, the plaintiff is not in default if he files his replication to the several answers within six weeks from the final intimation by the Government, even though it be much more than six weeks since some of the answers were filed.(*b*)

If a defendant, who has been served with a summons to appear, shall appear and admit the truth of the plaintiff's bill of complaint, the Court on examining the allegations of the plaintiff only, and the depositions of his witnesses, is to decree and give judgment in the same manner as if the defendant had appeared, answered, and entered into proof.(*c*)

Rejoinder.

The defendant must rejoin to the reply on the same day, but is not permitted to introduce in his rejoinder any matter not contained in his answer. He is required simply to deny the truth of the reply of the plaintiff, or of the parts of it which he means to dispute; and to aver the truth or competency of his own answers; and, as a general rule, no further pleadings are admitted in the cause.(*d*)

Effect of defendant failing to put in his rejoinder.

When a defendant refuses or neglects to file a rejoinder within the period prescribed for that purpose, the Court before which the suit may be depending, after recording such refusal or neglect, proceeds to trial in the same manner as if a rejoinder containing a general denial of the claim had been regularly filed.(*e*)

These written allegations of the parties, the plaint, answer, replication, and rejoinder, are called the pleadings.

The plaint, as has been already stated,(*f*) must be written upon stamped paper, the value of which is determined by that of the thing sued for.

(*b*) R. S. C. 24th November, 1845, p. 72; Reg. II., 1814.

(*c*) Reg. IV., 1793, Sec. 11.

(*d*) Reg. IV., 1793, Sec. 5, Benares; Reg. VIII., 1795, Sec. 2, Ced. and Conq. Prov.; Reg. III., 1803, Sec. 5; Reg. XXIII., 1814, Sec. 25; S. D. 1849, 20th June, p. 240.

(*e*) Reg. XXIII., 1814, Sec. 25, Cl. 5; Reg. XXVI., 1814, Sec. 6, Cl. 2.

(*f*) Supra, p. 109.

A petition in the Moonsiff's Court brought in under a proclamation of the kind mentioned above(*g*) for a share of the inheritance sued for, may be written on plain paper.(*h*)

When a plaint has been filed and no answer put in, the plaintiff is ordered to file documents and a list of witnesses in support of his claim. If he does not comply with this order within six weeks, the case is liable to be struck off the file for default under Act XXIX., 1841.

But if the defendant puts in his answer, the order is superseded, for then the duty of the plaintiff is to file his replication, and afterwards he is ordered anew to file exhibits and a list of witnesses: and it is erroneous under such circumstances to treat the plaintiff as in default.(*i*)

Under the provisions of Act XXIX., 1841, a Moonsiff cannot strike a cause off on default, prior to the filing of the answer, before the expiration of six weeks.(*j*)

If a defendant appears, in a Moonsiff's Court at any time whatever before the plaintiff's evidence has been taken in the cause, he is permitted to file his answer;(*k*) but in the higher Courts he cannot do so unless he assigns satisfactory reasons for his default.(*l*)

The subject of amended and supplemental pleadings will be considered in the next chapter.

On what stamps pleadings are to be written.

All pleadings after the plaint, in the Court of the Zillah Judge, are written on paper of the value of four rupees, except in original suits for property not exceeding one thousand rupees in value, and in cases of appeal from the decisions of Sudder Ameens and Moonsiffs. In such cases, the pleadings are written on stamped paper of only one rupee value.

The pleadings in the Court of the Principal Sudder Ameen are written on paper of one rupee value; those in the Sudder

(*g*) Supra, p. 149.

(*h*) Con. 706, Cal. C. 20th July, West. C. 17th August, 1832.

(*i*) S. D. 1847, 10th May, p. 290.

(*j*) Con. 1339, West. C. 18th May, Cal. C. 10th June, 1842.

(*k*) S. D. 1849, 1st November, p. 417; Reg. XXIII., 1814, Sec. 24. But query as to the operation of Act XV., 1850.

(*l*) Supra, p. 157.

Ameen's Court, on paper of eight annas value: and the pleadings in Moonsiff's Courts (except the petition of complaint) are written upon unstamped paper.(*m*)

The prescribed pleadings must be completed and read in open Court, before any exhibits are filed or any witnesses summoned in support of the allegations of either of the parties, unless special and sufficient reason be assigned for taking the immediate deposition of a witness in the meantime,(*n*) as where the witness is affected with a dangerous illness, or is of very advanced age, or is about to quit the jurisdiction of the Court.

Preliminary hearing of the pleadings.

The reason of requiring the pleadings to be read in open Court is, as will be seen hereafter, to enable the Judge to ascertain the real points at issue in the cause, and to regulate the future conduct of it.

It is for this review by the Judge, then, that the parties must in the first instance prepare their pleadings or written allegations of fact; and it is necessary to investigate the forms into which these statements are wont naturally to fall, or into which they may most conveniently be reduced, and also the duty which the Judge has to perform with respect to them.

SECTION II.

SUBSTANCE OF THE PLEADINGS.

Origin of suits.

Questions of law.

Of fact.

A SUIT commonly arises out of some dispute of the following kind. The parties admit certain facts to be true, but dispute as to their legal consequences; or they do not agree as to the truth of the facts, although they agree as to the legal consequences which the facts, if proved, would lead to: or they

(*m*) Reg. V., 1831, Sec. 9, Cl. 2; Sec. 20; Reg. VII., 1832, Sec. 3; Con. 767, West. C. 8th, Cal. C. 29th March, 1833; Con. 1118, West. C. 15th December, 1837, Cal. C. 7th January, 1838.

(*n*) Reg. XXVI., 1814, Sec. 10, Cl. 1.

differ as to the truth of alleged facts, and also as to the consequences of the facts if true.

Both of law and of fact.

The parties are required to put in their statements and counter-statements in writing, in order that it may be made apparent how far they agree, and what they really differ about, that the Judge may, upon a review and comparison of of those documents, perceive what questions he has to try, and that he may regulate the further conduct of the controversy; deciding at once the questions of law, if there be no dispute as to facts; and, where facts are disputed, directing how they are to be investigated. The parties, too, being thus compelled to examine closely the merits of the case, have an opportunity of arranging the dispute without proceeding to trial.

Why pleadings are required.

Where the defendant does not admit the justice of the plaintiff's demand, he must closely scrutinize the nature of that demand, and also the manner and form in which it has been brought forward, and must then proceed to frame his answer.

Of framing the answer.

Every suit is brought with a view to the enforcement of some real or alleged right, and the essence of the defence always is, either that the alleged right has no existence at all, or that there is a higher right in the defendant.

Substance of suit and of defence.

The claim, however expressed or arranged, and encumbered as it too often is by a multitude of immaterial allegations, commonly amounts in substance, though not in form, to an assertion of, or a reference to, some general rule of law, an assertion that the case falls within that rule, and a demand that the general rule may be applied to the particular case, by granting to the plaintiff the relief which he seeks.

Constitution of plaint.

Thus the claim may be founded upon a general rule, not expressed in the plaint, but in substance referred to and relied on, that an only son is entitled to possess the land of his deceased father; or upon a rule, that a creditor is entitled to recover from his debtor the sum lent, together with the interest which he stipulated for.

It then asserts that the plaintiff's case falls within the rule, *i. e.*, that certain land was the land of A., deceased; and that the plaintiff is his only son: or that the plaintiff lent a certain sum of money to the defendant at a certain rate of interest; and it concludes with a demand for the practical application of the rule; that is, (if the conclusions be correctly drawn) that the land of A., be given up to the plaintiff, or that the debtor may be ordered to pay to him a sum equal to the sum lent and the interest due upon it.

Constitution of defence.

The opposite party will naturally deny, if he can, the existence of the alleged general rule of law, or the truth of the assertion that the plaintiff's case falls within that rule; or he will argue that the demand of the plaintiff is not founded on a correct application of the rule to the particular case. His defence will prevail, if he can successfully deny it to be the law that an only son is entitled to succeed to the land of his father, or that a creditor is entitled to recover principal and interest from his debtor; or if he can successfully controvert the statement, that the plaintiff is son of A., or that the plaintiff lent money to the defendant. The defence will prevail in whole or in part, if the lands demanded in the suit were not the lands of A., or if the sum demanded exceeds the principal and interest due to the plaintiff.

Points at issue.

If the defence be of this simple character, the case may be disposed of by investigating and deciding the points upon which the parties have respectively taken their stand; as, whether the general rule of law be such as the plaintiff has alleged; whether the plaintiff is the son of A.; whether the alleged debt was ever contracted; whether the land demanded was the land of A.; whether the sum demanded be greater than the debt alleged to have been contracted.

The defence, however, may be much more complicated. Admitting, or at least not directly controverting, the facts alleged by the plaintiff, the answer may avoid or elude their effect by alleging some other facts.

It may be true that the land of a father descends by law to his only son, that the land demanded was A.'s, and that the plaintiff is his only son, yet the defendant may have bought the land from the plaintiff and paid him for it, and so he may conclude that he shall be allowed to retain the land.

It may be true that the law enforces the payment of debts and that the defendant borrowed of the plaintiff the sum alleged—and yet the former may reply that he has obtained from the plaintiff a release of this obligation, and therefore that he ought not to pay the sum demanded.

If the plaintiff denies that he sold the land, or that he executed the alleged release, the case is simple, and may be decided as soon as the investigation of the disputed point is complete. The plaintiff may, however, without direct contradiction, destroy the effect of this defence.

The purchase may have been procured by fraud. The release may have been extorted by violence. Upon the other hand, the fraud or the violence may be directly denied: and thus the parties are at issue, and the result of the suit will depend upon the determination of these questions of fact. But the defendant, without direct contradiction, may still elude the effect of such defences. He may allege that the plaintiff subsequently, and when under no deception, confirmed the sale of the land: or that he confirmed the release when under no coercion: such pleas will probably be admitted or denied at once, and the result of the suit depends upon their truth or falsehood.

Facts to be set forth at large in pleadings.

These different matters cannot, according to the law of the Civil Courts, be opened, one after another, in a series of pleadings; little latitude is conceded to either party in the replication or in the rejoinder, and it is necessary that the main facts upon which they respectively rely should be set forth at large in the plaint and in the answer.

1st Defence. That the case stated does not of itself entitle

With a view to develop the vital questions in a suit, it is desirable that the defendant should in the first place consider whether the facts, as stated in the plaint, do really, if true,

to the relief prayed for.

bring the plaintiff's case within any known rule of law, which may entitle him to the assistance of the Court: for if they do not so entitle him, it is unnecessary to inquire whether they are truly or falsely stated.

2nd Defence. That by reason of a fact not stated, the case stated does not entitle to the relief prayed for.

The second enquiry is whether, supposing the facts to be truly stated in the plaint, and to be sufficient, if they stood alone, to entitle the plaintiff to the aid he has prayed for; there is not yet some decisive fact, not stated in the plaint, but known to the defendant, which may afford a complete reason why the Court should refuse to pronounce any decree in favour of the plaintiff; the establishment of the one fact thus propounded will decide the suit, and will render it unnecessary to inquire into the truth of the statements in the plaint.

Besides advancing prominently those short and decisive points which may put an end to the case with as little delay and expense as possible, it is the province of an answer to state fully to the Court the nature of the defence upon which the defendant means to rely.

3rd Defence. That the case stated is wholly or partially false.

In this respect the answer consists, in fact, of a series of pleas, such as have been already considered, either denying facts upon which the plaintiff rests his case, or confessing the facts, but giving them a different character and operation by the introduction of new matter from which contrary inferences may be drawn.

It is obvious that each of these defences may embrace one or more of the points which have been already noticed as entering into every defence.(o)

There may be no such law as alleged; the facts may not bring the case within the rule of law; the application of the law to the facts may result in a conclusion different from that which the plaintiff has drawn.

1st Defence.

As to defences falling under the first head.

Objections apparent in the

It may appear by the plaint itself that the period prescribed by the rules of limitation, has elapsed since the cause of ac-

(o) Supra, p. 186.

tion accrued, or that the suit is undervalued, or that it has been instituted in the wrong Court, either with reference to the rank of the Judge or to the local limits of his jurisdiction; as where a suit is brought in the Moonsiff's Court for 5,000 rupees, or is brought in Zillah A., for lands situated in Zillah B.

plaint; limitation, valuation or jurisdiction.

So it may appear that the plaintiff, by reason of some personal disability, is not entitled to sue, as in the case of an alien enemy; or that he is not entitled to sue alone, as where he is an infant or an idiot, and no competent person sues on his behalf; or that the plaintiff has no interest in the subject,—as where a man sues for lands as an inheritance from his grandfather, and the plaint admits that his father is alive, or does not state that he is dead, or where the plaint in any way discloses that another person exists, having an interest prior to that of the plaintiff.(*p*)

That plaintiff is under personal disability:

Or has no interest in the subject.

Where A. sues for the property of B., deceased, alleging that B. died childless, and that the person in possession of his property as adopted son was not duly adopted, and that A., as son of a brother of B., by the half blood, is the nearest collateral relative and therefore the heir of B.; A.'s claim is answered at once by shewing, either through his own admissions or otherwise, the existence of a son, duly adopted, of a brother of B., by the whole blood.(*q*)

The plaint may be, on the face of it, deficient in some of the points which have been already(*r*) enumerated as essential.

Defects appearing by the plaint.

It may fail to shew that the plaintiff has done all that was necessary to entitle him to sue, or it may assert a future or a precarious title in him, or it may shew that there is no privity between him and the defendant in respect of the thing sued for; or that the party who is sued has not that interest in the subject which can render him liable to the claims of the plain-

That the party sued is not interested.

(*p*) S. D. 1848, 10th August, p. 762.

(*q*) Shamchunder and Rooderchunder *v.* Narayni Dibch and Ramkishore Rai, Sel. Rep. 21st August, 1807, v. 1, p. 209, 3 Knapp P. C. R. p. 55.

(*r*) Supra, Chap. XIII.

tiff; as where a plaint is filed either to enforce or to impeach an award, and the arbitrators are named as defendants, though no misconduct is imputed to them.

Suit too narrow or too comprehensive.

Sometimes the suit is insufficient to answer the purpose of complete justice, because it does not include all proper parties, or because it is too limited or too comprehensive, tending to multiply litigation unreasonably, or confounding distinct subjects in the same suit.(*s*)

2nd Defence.

Many of these defects, even where they exist, and are known to the defendant, may not be apparent from the plaint itself, and may require to be brought forward by the defendant, as matters of fact.

Pleas connected with limitation, valuation and jurisdiction.

Thus objections relating to limitation, valuation, or jurisdiction, may be brought forward and pleaded in the way of direct statement, if the facts on which the objection is grounded do not appear on the plaint; and, if an objection on the ground of lapse of time be pleaded in the answer, the plaintiff must set forth in his replication (not having done so in the plaint) the ground on which he alleges that his claim is cognizable notwithstanding the lapse of time.(*t*)

Plea of previous decree.

Of suit pending.

There may be a previous decree by which the rights of the parties have been already determined, or a suit may be already pending between the same parties for the same cause.(*u*)

How to be stated.

Such pleas ought to be stated with precision. Thus upon a plea of a former decree, so much of the former proceedings ought to be set forth, as is necessary to shew that the same point was then in issue, and that the former order really determined that the plaintiff had no title to the relief sought by him: for a nonsuit or an order to dismiss a plaint for want of prosecution, does not seem a sufficient bar to a second suit.

(*s*) Supra, Chap. X., XI.

(*t*) Reg. II, 1805, Sec. 3, Cl. 2; S. D. 1849, 26th April, p. 125; S. D. 1845, 31st July, p. 254.

(*u*) Supra, Chapter VIII.

A plea that another suit is depending for the same cause, ought expressly to aver that the second suit is actually for the same matter as the first, and should not merely state matter tending to shew this, as a matter of inference: and it ought also to aver that there have been some proceedings in the other suit, and that it is still going forward.

Plea of an account settled.

To a suit for an account, a plea that an account has already been finally stated and adjusted is a good answer. Such a plea ought not to be a vague assertion, but ought to shew that the account was in writing, and it should aver that it was a just and true account, and should state how and when the adjustment took place, and whether the vouchers were delivered up.

Of an award.

So if the suit be for enforcing claims which were adjusted by arbitration, the award may be pleaded in bar, unless the suit be brought expressly to set aside the award for misconduct in the arbitrators.

Disclaimer.

Sometimes the defendant denies by his answer that he has any right to the thing demanded by the complainant, and disclaims or renounces all pretensions to it. He cannot, however, disclaim a liability, merely by alleging that he has no interest in the matter of the suit; for others may have an interest in it against him, as where he is called upon for an account. Nor can a disclaimer by one defendant be permitted to prejudice the plaintiff's rights as against the others. Thus, if lessor and lessee be sued together, the disclaimer of the lessor must not be suffered to prejudice the rights of plaintiff against the lessee.

3rd Defence. Answer at large.

When the defendant passes on from the first and second class of defences to his general answer, he ought to state all the circumstances of which he intends to avail himself by way of defence: not indeed so largely as to set forth the particulars of the evidence by which he intends to support his main positions or statements of fact, but yet so fully, as to shew all the points which he intends to prove by evidence.

Such reasonable disclosure is required, in order that the plaintiff may be enabled to controvert or to explain the facts

so stated: and it is not just that the defendant should be allowed to avail himself of any matter which he has not thus brought openly forward, even although it should appear in his evidence; for such evidence cannot be tested in the usual way.

Answer must state defendant's conclusions.

Even when the facts are uncontroverted, the plaintiff is entitled to have upon the record, in a clear and precise form, the conclusions which the defendant intends to be drawn from them, in order that he may have an opportunity of shewing, if he can, that those conclusions are incorrect.

Matters within knowledge of defendant.

Matters which rest within the personal knowledge of the defendant must be truly stated by him: thus if A. sues B. for money lent, B. must answer either that he never borrowed the money, or that the debt has been in some way discharged or released.

Alternative defences.

In matters of which he has no certain knowledge, the defendant may set up any number of defences as the consequence of the same state of facts, or of facts which are consistent with each other; he may shew that the facts which he knows, may be attributed to different causes, each cause being favourable to himself and adverse to the claim of the plaintiff.

Thus if A. sues the heir of B. for a debt alleged to have been due from B. to A., the defendant may rely upon a written acknowledgment by A., that B. at the time of his death owed him nothing; and the defendant may insist upon this as shewing either that the alleged debt never was contracted, or that, if contracted, it was fully discharged.

Must not be inconsistent with each other.

But he cannot insist on two defences which are inconsistent with each other, or are the consequence of inconsistent facts. For instance, it cannot be true, both that A. never had a son, and that A.'s only son died in infancy.

It is not just that the defendant, who is presumed to intend to prove every thing that he states, should be allowed to state as true, circumstances wholly irreconcilable with each other.

Where such inconsistent statements appear in an answer, it is not too much to say that the defendant ought to be deprived of the benefit of either. But at least he ought to be

compelled to elect between his inconsistent statements, and to adduce evidence in support of that allegation only, to which he chooses to adhere.

Double defence.

But the defendant is at liberty to deny the plaintiff's general title, and also to insist that even if he establishes his title, he is precluded from obtaining what he demands by some other circumstance, which would equally serve to preclude him or any otherwise person claiming in the same right; *e. g.*, he may deny that the plaintiff is the heir of A., and also deny that if heir of A., he is entitled to the land which he claims as such heir. There is nothing inconsistent in such a proceeding; for by denying the plaintiff's title the defendant merely puts the plaintiff to prove his own case; to shew that he has a *primâ facie* right to sue—that he is the heir of A. If this question is determined against the plaintiff upon investigation, there is an end of the suit. If it is determined in his favour, there still remains the question, whether the heir of A. has a better title than the defendant.

How defendant's case ought to be stated.

The defendant's case perhaps need not be so precisely stated as that of the plaintiff, for the defendant seeks nothing from the Court, and is successful if he merely causes the complainant's demand to be rejected: whereas the latter is seeking a decree, and must lay a precise foundation for it.

It is prudent to state the case of the defendant pretty fully, even although he may have a very strong plea which may be urged in few words, against the plaintiff's demand.

Thus, if the suit be for possession of lands, and the answer be that the defendant bought them and paid the price to a person undoubtedly entitled to sell them, it is still right to set out any additional circumstances in favour of the defendant, such as that he has expended a considerable sum of money in improvements, with the knowledge of the plaintiff.

Consequences of not answering fully.

It is proper, with reference to the evidence that is to be offered, and also to the impression which the perusal of the pleadings is likely to make upon the mind of the Judge, that the answer should meet the plaintiff's statement at all points

as fully as possible, since the adverse statement is likely to be presumed true, where the defendant has not controverted it.

What matters need not be answered.

A defendant, of course, need not answer matters which are foreign to the general scope of the suit; or which, though important to the general scope of the suit, do not affect himself; or matters which he does not know; nor need he argue questions of law at length in the written pleadings, for such discussions are better reserved for the hearing, although it is not the habit of the tribunals of this country to discourage such argument in the pleadings.

He ought however to use reasonable diligence to obtain all information that is accessible to him.

If he is called upon to set forth a deed or other instrument, he should give the very words of the document.

Denial in the form of negative pregnant.

If the defendant deny a fact, he should deny it directly, and not in the form which is called negative pregnant: thus, if a fact be stated to have been done with various circumstances, as if a man be charged to have done a thing upon such a day or in such a place, or to have received a particular sum, the defendant must not merely deny that he did the deed under the circumstances or in the manner alleged, or that he received the particular sum; for that does not exclude the supposition that he did the deed in some other way, or that he received some money though not the precise sum alleged: but he ought, if the fact be so, to deny point blank that he did the deed at all, or that he received any money.

The answer, like all other pleadings, must be free from scandal and impertinence.

CHAPTER XIX.

OF THE FIRST HEARING OF THE CAUSE.

How cause is to be tried.

WHEN the rejoinder has been filed, the Court, either immediately, or on a fixed day, as soon after the pleadings are closed as the state of its general business will permit, proceeds in ordinary cases to examine the truth of the complaint or claim, by the oaths of the witnesses who may be produced by the parties, if they have any witness to produce; or by the oaths of the parties themselves, or of either of them, if they or their Vakeels mutually consent to that mode of examination:(*v*) but although one party has proposed that the suit shall be decided according to the statement which his adversary shall make upon oath, the latter cannot be put upon oath, unless he consents to the proceeding.(*w*)

Oaths of parties.

Where the cause cannot be proceeded with.

It is possible, however, that a perusal of the pleadings may convince the Court, that the suit, as it stands, is so faulty, either in the frame of the pleadings, or in its constitution with respect to parties, or in some other particular, that it cannot be proceeded with to any good purpose. In such cases the Court will not go into the merits of the suit, but will at once pass an order of nonsuit or of dismissal, or will, upon due application made, permit the parties to amend defective pleadings.

It will be seen that many of these points may in fact be brought before the Court by petition, at an earlier stage of the

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(*v*) Reg. IV., 1793, Sec. 6, Benares; Reg. VIII., 1795, Sec. 2, Ced. and Conq. Prov.; Reg. III., 1803, Sec. 7; Reg. XXIII., 1814, Sec. 28, S. D. 1849, May 15th, p. 151, S. D 1848, April 20th, p. 348, June 24th, p. 586.

(*w*) Sel. Rep. 2nd December, 1840, v. 6, p. 305.

cause than that which is now under consideration, but it appears most convenient that they should be viewed together in this chapter.

Preliminary objection to be first considered.

If there is matter of defence, which may render all further investigation unnecessary, it is the duty of the Judge to dispose of it in the first instance.

If, for example, it should appear on the face of the plaint, or should be pleaded by the defendant as a matter of fact, that the suit has been instituted in a Court, within whose jurisdiction the cause of action did not arise, and the defendant does not reside as a fixed inhabitant; or that it has been brought on a wrong valuation, or that it is barred by lapse of time, or by any other cause; it is incumbent on the Judge to restrict himself in the first instance to that individual point; and if satisfied of the validity of the defendant's objections, to nonsuit the plaintiff accordingly; or to dismiss the suit, without entering upon the consideration of matters which cannot legally be investigated or adjudicated in his Court.(*x*)

Where the suit appears to be identical with a suit formerly decided between the same parties, it ought to be dismissed forthwith.(*y*)

Nonsuit.

The proper order in regard to a plaint, deficient in precision, or in any respect irregular or incomplete, is one, not of entire rejection, but of nonsuit only.(*z*)

An order of nonsuit has the effect of charging the costs of all the proceedings upon the party nonsuited, but leaves him free to sue again for the same matter.

Defective valuation of suit.

One ground of nonsuit is wrong valuation. Every plaint, must, as has been already stated,(*a*) specify the value of the thing claimed.

How objected to by defendant

If the defendant disputes the plaintiff's valuation of the property sued for, or has any other objection relative to the

(*x*) Cir. Ord. 13th September, 1843, para 2.

(*y*) S D 1850, 19th March, p 58.

(*z*) S. D 1849, 3rd May, p. 136, See S. D. 1849, p. 162, Supra, Chap. XIII.

(*a*) Supra, p 109.

value of the stamped paper on which the plaint is written, he must bring forward his objections in answer to the plaint, and he cannot bring them forward, as a matter of right, at any subsequent stage of the cause.(b)

He cannot, however, demur summarily to the plaint of a pauper, on the ground of exaggerated valuation of the property claimed; but must reserve his objections for his answer.(c)

Summary inquiry.

If an objection to the valuation or stamp is taken by the answer, the Judge proceeds, before the pleadings are completed, to make such summary inquiry as may appear necessary:(d) and if he finds that the suit has been underrated, without any fraudulent intention either to evade the stamp duty, or to render the suit not cognizable in appeal by the tribunal by which it ought of right to be so cognizable, he gives permission to the plaintiff to remedy the defect, by filing a duplicate plaint, upon a stamp of such value as to supply the defect. If he finds that there has been a fraudulent intention, he passes an order of nonsuit.(e)

Duplicate plaint to supply the defect.

Nonsuit.

If the objection has been duly taken by the answer, and the plaintiff has not put in his duplicate plaint before the pleadings have been completed, the defendant has a right to require the Judge to consider the question of valuation, before he proceeds to try the merits of the action; and is entitled, on proof that the value is understated in the proportion of ten per cent., to obtain from the Court an order of nonsuit. The Court has no power to grant the plaintiff permission to supply the deficiency after the pleadings have been completed.(f)

A party who appears, by the facts stated by himself in the plaint, to have fixed too low a valuation upon the property sued for, must be nonsuited.(g)

No nonsuit unless understated in pro-

An action is not liable to nonsuit, from the difference between the value stated and the real value of the property

(b) Reg. XIII., 1808, Sec. 4. Cl. 1; Cir. Ord. 20th August, 1841.

(c) Con. 821, Cal. C. 30th August, West. C. 20th September, 1833.

(d) Cir. Ord. 19th June, 1840.

(e) S. D. 1849, p. 4.

(f) Reg. X., 1829, Sched. B., Art. 8.

(g) R. S. C. 2nd October, 1847, p. 120.

portion of ten per cent.

sued for, unless the value be understated in the proportion of ten per cent.; but wherever an undervaluation is shewn, the plaintiff must make up the deficiency.(*h*)

Where over estimate is ground of nonsuit.

It is no ground of nonsuit that the property has been overestimated, unless the effect be to remove the suit from the cognizance of that Court by which it ought, according to the general law of the country, to be determined; as where the suit would, if the overvaluation were permitted, be made appealable to the Sudder Court instead of to the Zillah Judge.(*i*)

The Court itself takes cognizance of valuation.

Although the defendant can, as a matter of right, object to the valuation at one stage only of the suit, yet it has been deemed proper, in order that the revenue may not suffer from a combination between litigant parties, to invest the Courts themselves with original powers upon this subject.

Where the Courts authorize plaintiff to correct errors in valuation.

It has accordingly been enacted that if during the trial of any regular suit it appears, either to the Court of original jurisdiction, or to the Court of appeal, that the plaint has been written on stamped paper of less value than that which ought to have been used, and if the Court is of opinion that the error or omission did not arise from any fraudulent motive, or from any design on the part of the plaintiff or appellant to evade the law, it may either permit or direct him to file a duplicate of the plaint, on stamped paper of value sufficient to complete the full amount of the stamp duty.(*j*)

Dismissal at first hearing.

It is the duty of the presiding Judge to dismiss the claim altogether, when, upon any clear rule of law, it is manifest from the existing record that the cause must ultimately be so dealt with; as where the plaint itself shews that the claim is barred by limitation, or is wholly illegal.(*k*)

Where suit barred by limitation.

If a suit is barred by the twelve years' rule of limitation, the Court must itself take notice of this circumstance, at whatever

(*h*) R. S. C. 9th December, 1845, p. 75.

(*i*) S. D. 1849, 4th December, p. 431 *h*.

(*j*) Reg. XXVI., 1814, Sec. 7, Cl. 1; Cir. Ord. 20th August, 1841.

(*k*) S. D. 1849, 23rd May, see p. 162; S. D. 1849, see p. 238; Reg. III., 1793, Sec. 14; S. D. 1848, 16th December, p. 874.

stage of the cause it is brought to light, and whether it is or not pleaded in bar of the claim.(*l*)

Whether pleaded or not.

But if the case be exempted from the operation of the twelve years' rule by the existence of some of the circumstances contemplated by Regulation II., 1805, that Regulation must (as has been already said)(*m*) be specially insisted upon, or the Court will not give it operation.

Investigation where Reg. II, 1805, is pleaded.

Where the regulation is thus insisted upon, the Court, after taking the answer and rejoinder of the defendant, proceeds, if the alleged unjust and dishonest acquisition be denied by the defendant, to examine any evidence that may be adduced by the plaintiff in proof of his allegation; as well as any evidence that may be brought by the defendant to prove his just and honest acquisition of the property claimed, or the just and honest possession of it by himself and his predecessors during more than twelve years; after which the Court determines whether the suit in question be cognizable under the regulation or otherwise. If the determination be in favour of the plaintiff, the merits of the plaintiff's claim are investigated, notwithstanding the lapse of time, just as if the claim had been regularly preferred within twelve years after the origin of the cause of action.(*n*)

The merits cannot be gone into, until the question of limitation has been disposed of.(*o*)

Misjoinder of claims is an irregularity, and is visited with the penalty of nonsuit. But nonsuit is not the inevitable consequence of misjoinder, for if it were, it would in some cases become a privilege.

Nonsuit for misjoinder.

Misjoinder does not save from absolute dismissal.

Where a claim, which, if it stood alone, would be properly disposed of by an order of total dismissal, (as for instance a claim which on the face of it is barred by the law of limitation) is incorrectly joined in one plaint with a claim of a different kind, the Court will dismiss the former claim, and

(*l*) S. D. 1849, April 26th, p. 125.
(*m*) Supra, p 117.
(*n*) Reg. II., 1805,
(*o*) S. D. 1850, 28th March, p. 79.

will pronounce an order of nonsuit as to the latter claim on account of the misjoinder. The claim, which in itself merits dismissal, is not exempted from dismissal by the additional fault of misjoinder.(*p*)

Supplemental plaint where permitted.

If from mistake, inadvertence, or other cause, the plaintiff shall have omitted to insert in his complaint any thing material to the suit, the Court, on his representing the omission, allows him to prefer a supplemental plaint, in which he states the matter omitted. The defendant delivers an answer to the supplemental plaint on a day fixed for that purpose; and the plaintiff and defendant reply and rejoin in the same manner as on the original plaint.(*q*)

Pleadings thereupon.

Supplemental answer where permitted.

In like manner, if the defendant, from mistake, inadvertence, or other cause, shall have omitted to insert in his answer any thing material to his defence, the Court, upon his representing the omission, permits him to deliver in a supplemental answer.

The parties then reply and rejoin in the same manner as on the original answer.

Only once permitted.

But no more than one supplemental plaint, or one supplemental answer, can be received by the Court.

Court must be satisfied of propriety of admitting supplemental pleadings.

No supplemental plaint or other supplemental pleading can be admitted in any suit, unless the Court, upon a perusal of the pleadings previously filed, and upon consideration of the circumstances alleged by the parties, shall deem it just and proper to admit it.(*r*)

Supplemental plaint by pauper to add parties.

If a man who has obtained permission to file his plaint as a pauper against certain persons, desires to include as defendants other parties whom he has not mentioned in his first application, he must apply again for permission to include them in the suit: and his examination, and the inquiry as to his possession of property, should be gone into again before them, to give them an opportunity of shewing cause against the application: for which purpose they ought to be served with notice.(*s*)

(*p*) S. D. 1849, 23rd May, p. 167, Supra, Chap. X.

(*q*) Reg. IV., 1793, Sec. 5.

(*r*) Reg. XXVI., 1814, Sec. 6, Cl. 3.

(*s*) R. S. C. 26th July, 1847, p. 112, Supra, p. 9.

As it is necessary that the Zillah Judge should decide as to the existence of sufficient ground for the institution of a suit *in formâ pauperis*, so it rests with him to determine whether there be probable cause for extending the scope of a suit already sanctioned, to new defendants and additional property, and he alone is competent to admit a supplemental plaint to be filed by a pauper plaintiff for this purpose.(*t*)

Admitted only by Zillah Judge.

A plaintiff who has not instituted his suit as a pauper, cannot afterwards in the course of it be admitted to proceed as a pauper: because he has already paid the institution fee and defrayed the other usual preliminary expenses.(*u*) But if it should become necessary to adopt any proceedings involving fresh outlay, such as the amendment of a plaint, in consequence of which a higher stamp will be required and the Vakeel's fees enhanced, the plaintiff, alleging his inability to bear this expense, will be allowed time by the Court before which the suit is pending, that he may present a petition to the Zillah Judge for permission to proceed as a pauper. Such a petition is dealt with precisely like a petition to sue originally as a pauper.(*v*)

Application by ordinary plaintiff to proceed as a pauper.

If the plaintiff does not state either the extent or the boundaries of the land sued for, (where such specification is necessary to the execution of any decree that may be passed in his favour) and does not apply for permission to supply the omission by a supplementary plaint, he must be nonsuited as of course.(*w*)

Neither a Sudder Ameen nor a Moonsiff can receive a supplemental plaint or answer; that is to say, an additional pleading intended to supply any thing material in the suit, which from mistake, inadvertence or other cause the party may have omitted to insert in the plaint or answer,(*x*) and

Sudder Ameen and Moonsiff cannot receive supplementary pleadings.

(*t*) R. S. C. 25th August, 1846, p. 83.

(*u*) Con. 186, 31st August, 1814.

(*v*) Con. 1313, West. C. 3rd, Cal. C. 31st December, 1841. Supra, p. 6.

(*w*) S. D. 1848, June 29th, p. 613 1849, 26th April, p. 124, 31st October, p. 411. Supra, p. 121.

(*x*) Reg. XXIII., 1814, Sec. 35, Cl. 3; Reg. V., 1831, Sec. 15, Cl. 3; Con. 1308; Cir. Ord. 3rd June, 1847.

the order of a Judge or Principal Sudder Ameen directing a Sudder Ameen or Moonsiff to receive such supplemental pleading, is illegal.(*y*)

Thus if the plaintiff has omitted to sue for the interest as well as the principal of a debt,(*z*)—or if he has valued his suit upon an erroneous principle, (as for instance at the auction selling price, where three times the sudder jumma was the proper measure)(*a*) he is not allowed to file a supplemental pleading in which he claims interest, or in which he values his suit correctly at the higher amount.

But evident errors may be rectified in any Court.

But if he has made an evident mistake in regard to that which he has inserted in the original plaint,—as if he has sued both for principal and for interest, or has adopted the right principle of valuation, but has miscalculated the amount,—he is at liberty to file a petition designed to rectify such evident error.

Error as to name.

A petition filed to correct an error as to the name of the heir of a defendant to a suit, is not considered as a supplementary plaint, and may be received although a supplementary plaint has been already filed.(*b*)

A petition for leave to correct that which is an evident error in the pleadings, should, in the first instance, be received by the Court, and should not be treated as a supplementary pleading.

But such petition should not be put on the record, unless the Court, upon duly considering it (which ought to be done as soon as convenient after its being presented,) passes an order for its admission, upon clear and satisfactory proof that the error indicated arose merely from mistake and inadvertence.(*c*)

The proof of mistake and inadvertence may be drawn from the internal evidence afforded by the pleading itself, or it

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(*y*) S. D. 1847, 27th May, p. 309.

(*z*) Supra, p. 82.

(*a*) Supra, Chap. XIV., S. D. 1847, 27th May, p. 309.

(*b*) R. S. C. 8th January, 1844, p. 55.

(*c*) S. D. 1850, 16th April, p. 113; Genl. proceeding of S. D. A. dated 9th April, 1850. Ibid.

may rest upon extraneous evidence which is satisfactory to the Court.

Where the plaint misstated the date of a very material document, and after the answer was put in, and, seven months after the plaint was filed, the plaintiff petitioned for leave to amend the date, the circumstances of the case being such as to shew that the original misstatement had not arisen from mistake or inadvertence, the Court refused to sanction the amendment.(*d*)

When Collector erroneously named as defendant.

Where the plaintiff has, in contravention of Regulation XI., 1822, Section 38, made the Government or any of its officers a party in respect of alleged errors or irregularities of the nature described in that enactment, he is liable to be nonsuited with costs.(*e*) These provisions are considered applicable, where a Collector is made a party to an action for the recovery of property attached by an Ameen appointed by the Collector, under instructions from the Civil Court;(*f*) and to the suits described in Regulation VII., 1822, Section 31.(*g*)

In such cases, on the suit being first brought up for hearing, the Judge points out to the plaintiff or to his Vakeel, that he has rendered himself liable to be nonsuited for improperly making the Collector, or other officer of Government, a defendant in his official capacity. If he state that he has done so from inadvertence, and if the Court is satisfied that the act was not wilful and did not proceed from any fraudulent or improper motive, he is allowed to file a supplemental plaint, withdrawing his claim against the public officer in his official character; after which the cause may be proceeded with in the ordinary way.(*h*)

(*d*) S. D. 1850, 16th April, p. 113.

(*e*) Supra, pp. 29, 30. See Sel. Rep. 24th April, 1837, vol. 6; p. 157.

(*f*) R. S. C. 5th February, 1835, p. 6. Supra, p. 167.

(*g*) Cir. Ord. Cal. C. 18th August, West. C. 15th September, 1837.

(*h*) Con. 1075, West. C. 13th January, Cal. C. 21st February, 1837; Cir. Ord. Cal. C. 7th July, West. C. 18th August, 1837.

Permission to add parties by supplemental plaint.

Where it appears, upon hearing the pleadings, or even at a later stage of the cause, that a material party has not been named as a defendant; if the Judge considers that the plaintiff has wilfully and for some unfair purpose omitted to make the person in question a defendant, he ought to nonsuit the plaintiff, permitting him to bring a fresh suit, including the name of the omitted party. But if the Court is of opinion that the omission of a necessary party has arisen from pure inadvertence and from ignorance of the practice, it ought to permit the plaintiff to put in a supplemental plaint, making the omitted person a defendant.(*i*)

Where Moonsiff may admit an additional pleading.

Even a Sudder Ameen or a Moonsiff may admit a supplemental plaint, if circumstances have so changed since the institution of the suit, that without any error or omission on the part of the plaintiff, his suit has become defective.

Where A. sued B. in the Moonsiff's Court for possession of real property in virtue of a deed of sale, and the right and interest of B. in the property were judicially sold to C. in execution of a former decree, after the institution but before the decision of the suit, it was held to be competent to the Moonsiff to receive an amended pleading, including C. among the defendants.(*j*)

It is a ground of nonsuit, that a person has been named as a defendant, who was dead at the time when the plaint was filed, but the plaintiff may prevent the order of nonsuit from being passed, by applying to the Court for leave to include the heirs of the deceased among the defendants.(*k*)

The filing of a second supplementary plaint, although unauthorized by law, is no ground of nonsuit, but such irregular pleading is treated as a nullity, and cannot be read or regarded in the proceedings.(*l*)

(*i*) Sel. Rep. 10th December, 1832, v. 5, p. 242; Moore's Indian App. v. 4, p. 143.

(*j*) Con. 1308, West. C. 28th August, Cal. C. 17th September, 1841.

(*k*) R. S. C. 24th March, 1846, p. 80; Reg. IV., 1793, Sec. 3; R. S. C. 21st September, 1847, p. 119.

(*l*) R. S. C. 21st April, 1845, p. 67.

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But where the effect of the irregular supplementary plaint is to cause an overvaluation which affects the course of appeal, the plaintiff will be nonsuited.(*m*)

(Supplementary pleadings allowed at any time before investigation.

A plaintiff is at liberty to apply for leave to amend his original claim by a supplementary plaint at any time before it has been investigated: it does not appear that he is bound to make the application until the original pleadings have been completed, but the Court will of course be less disposed to grant the desired permission if it is not sought as early as possible.(*n*)

As a general rule, no supplementary pleading can be received after the pleadings have been completed and the evidence gone into.(*o*) It has been made a question whether under the provisions of Regulation IV., 1793, Section 5, and Regulation XXVI., 1814, Section 6, Clause 3, a supplementary plaint is admissible to correct an error in the plaint which has been made manifest by the evidence adduced, and the better opinion seems to be, that such an application is to be received with great disfavour, and only to be granted in special cases, where no one can be injured by the concession.

Supplemental pleadings not to be directed by the Court itself.

Although the Court has power to allow a supplemental plaint or answer to be filed on the application of the party wishing to do so, yet it has no authority to order one to be filed in the absence of such application, nor to state the point, to which the supplemental pleadings are to be directed, nor the terms in which they are to be framed.(*p*)

Causes brought on in order of filing.

Causes are brought on for trial according to the order in which they may be filed and numbered, except in cases in

(*m*) S. D. 1849, 4th December, p. 431; Sel. Rep. 3rd July, 1841, pp. 41, 42. Supra, pp. 197, 198. It appears that in one case, after a considerable part of the evidence had been taken, the plaintiff filed a supplementary plaint to supply an omission in the valuation of the property, by which its value was raised to a sum beyond the competency of a Sudder Ameen to try. The record was accordingly returned by the Sudder Ameen (without any comment upon the irregularity) to the Zillah Judge, who then referred it to the Principal Sudder Ameen, Sel. Rep. 24th March, 1842, v. 7, p. 78.

(*n*) S. D. 1850. 3rd April, p. 92.

(*o*) Sel. Rep. 27th July, 1812, v. 2, p. 30.

(*p*) Cir. Ord. 14th October, 1842; R. S. C. 21st September, 1847, p. 191.

which it may be otherwise directed by any Regulation, or in which the Judge may think it proper for special reasons, which he is to state at large upon the record of the trial; to bring on the cause before its turn.(*q*). The Zillah Judge is authorized, either upon a report from the Moonsiff, or from other grounds of information, to direct the Moonsiff to bring any particular suit to a hearing and determination, without attending to the regular order of the file, and it would seem that in the absence of such direction the Moonsiff must not depart from the regular order(*r*) unless where property has been attached and taken under management.(*s*)

With these explanations as to the circumstances which may prevent the Court from trying a suit on the merits, or at least from doing so until its defects have been remedied, I proceed to state the ordinary course of dealing with such preliminary impediments, and of investigating the merits.

The duty which devolves upon the Judge at this stage of the controversy, is highly important. After each party has stated his own case, the Judge must collect, from the opposition of their statements, the points of the legal contest; he must review, collate, and consider the effect of the statements on either side: keeping in view the logical forms into which forensic contention may generally be resolved, (and of which I have endeavoured to trace the outline,) he must distinguish and extract those facts which are mutually admitted, and those which, though undisputed, are immaterial to the cause; and thus, by throwing off all matter which does not require investigation, he will arrive at length at the required selection of the questions to be tried by him.

The office of the Judge consists in determining the truth and the justice of matters pleaded before him; that is to say, the

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(*q*) Reg. IV., 1793, Sec. 19, Benares; Reg. VIII., 1795, Sec. 2, Ced. and Conq. Prov.; Reg. III., 1803, Sec. 20.

(*r*) Reg. XXIII., 1814, Sec. 26.

(*s*) See p. 169, Supra.

point of fact, and the point of right arising from that fact, and as it has been an object with the legislature of this country to prevent the parties being put to the trouble and expense of adducing testimony, before it is determined what points are relevant, that is to say, what points will, if established, materially affect the decision of the cause; the Judge has been required to indicate the points relevant on either side, the proof of which, or the failure of proof, as the case may be, will lead to a decree for or against the party. And as it is generally found that the parties have failed to separate the important matters in controversy from those which are unimportant, that they insist with earnestness upon facts which, if proved to be true, would not fairly warrant the conclusions deduced from them, and that they are apt to set forth long narratives and allegations neither true nor competent to be proved, it has been ordered that the pleadings should at this stage undergo a deliberate review and that the points to be established on each side should be judicially fixed and promulgated so as to avoid further question regarding their legal effect and relevancy.

Eight days' notice of hearing.

In order that the parties or their pleaders may be fully prepared for the hearing, eight days' previous notice is given (except in the Court of the Moonsiff) of the day on which the Court may propose to bring the suit to a hearing.(*t*)

For this purpose the Judge causes to be affixed in the Court-room, a notification, specifying the number of the suit, the names of the parties and of the Vakeels respectively engaged in it, together with the date on which it is to be brought to a hearing, and such notice is considered to be in force until the suit can be heard, either on the day fixed, or on any subsequent day.(*u*)

Settling the issues.

When the cause is brought on for hearing, the Judge (of whatever rank he may be) causes the pleadings on both sides

(*t*) Reg. XXVI., 1814, Sec. 12, Cl. 1; Con. 1226, West. C. 21st June, Cal. C. 2nd August, 1839.

(*u*) Ibid. Cl. 2.

to be read to him, and considers and records the point or points to be established respectively by the plaintiff, and by the defendant.(*v*)

The object of this proceeding is to reduce the matter of the pleadings to certain determinate issues, which the parties are required to establish by such evidence as they can produce.

Explanations of the parties; issues fixed.

If from the pleadings in the case, the points at issue cannot be clearly ascertained, or if from any other reason further explanations may be requisite, the Judge, at the first hearing, makes such enquiries from the parties or their pleaders as may appear necessary, with a view to ascertain the precise object of the action, and the grounds on which it is maintained; and he records the result on his proceedings.(*w*)

What may form subject of explanation.

The oral explanations are intended only to be in elucidation of allegations of fact *contained in the pleadings*, and no *new* allegations of fact are to be received upon these explanations.

Minute to be recorded.

It is quite essential to the legality of the proceedings of the Court, that a roobukary or minute should, upon this occasion, be drawn up and recorded.(*x*)

The Sudder Dewanny Adawlut has recently (*y*) circulated a specimen form of the required minute, for the guidance of the Zillah and subordinate Courts; the form is of course to be modified according to the circumstances of each suit.

Form.

" Proceeding of the Judge, Principal Sudder Ameen, Sudder Ameen or Moonsiff of
(as the case may be) under Section 10, Regulation XXVI.,

(*v*) Reg. XXVI., 1814, Sec. 10, Cl. 3; Reg. IX., 1831, Sec. 2, Cl. 7; Cir. Ord. 13th October, 1848; Act XV., 1850. By the last mentioned enactment, this proceeding was for the first time required of Moonsiffs. It may be questioned, however, whether the Act ought not to have expressly modified some of the existing rules for the Moonsiff's Court, which were framed with a view to a less formal and deliberate mode of procedure. See Supra, p. 183. Note (*l*).

(*w*) Reg. XXVI., 1814, Sec. 10, Cl. 2; Cir. Ord. May 8, 1850.

(*x*) Reg. XXVI., 1814, Sec. X., Cl. 10; S. D. 1847, 2nd August, p. 389; S. D. 1850, 5th March, p. 37; 26th March, p. 71, Sreemut Mootoo Vijayah, &c. *v.* Rany Anga, &c.; 3 Moore's Ind. Cases, 278. Ibid. 359. S. D. 1850, pp. 92, 138.

(*y*) Cir. Ord. 8th May, 1850.

1814, dated (These words with the names of the parties to the suit, and an abstract of the claim to be invariably written as the heading of the roobukaree.)

Issues in bar of the hearing of the suit.

" The issues raised in bar of the hearing of this suit are :(*z*)

" 1st. Whether the Civil Courts generally, or the particular Court in which the plaint is brought, can take cognizance of the suit.(*a*)

" 2nd. Whether the valuation of the suit as laid by the plaintiff is correct.(*b*)

" 3rd. Whether in consequence of any defect in the plaint, or of parties, &c. the plaintiff is, or is not, liable to be nonsuited.(*c*)

" 4th. Whether in consequence of a former suit dated having been instituted, or a former decree dated having been passed, regarding the same matter, this suit is, or is not, liable to be dismissed under Section 12 or Section 16, Regulation III., 1793.(*d*)

" 5th. Whether, in consequence of (here set forth the facts alleged) the suit is not liable to be dismissed on the ground of limitation under Section 14, Regulation III., 1793.(*e*)

" Or any other plea which may be urged for rejecting the plaint without going *into the merits.*

Material issues of fact.

" The material issues of fact, arising upon the pleadings after making any necessary inquiries, from the parties or their pleaders, under Clause 2, Section 10, Regulation XXVI., 1814, are—

1st, _____

2nd, _____

3rd, _____

&c. _____

(*z*) Supra, pp. 188, 191.

(*a*) Supra, Chaps. VI., VII., XV. p. 196.

(*b*) Supra, Chap. XIV. and See pp. 196, 197, 198, 202, 205.

(*c*) Supra, Chaps. X., XI. pp. 196, 200.

(*d*) Supra, Chap. VIII.

(*e*) Supra, Chap. IX.

"(Here only material points of fact, contested between the parties, should be stated;) averments acknowledged by both parties need not be set forth in this proceeding:—

1. For plaintiff.

"*First.* The material issues on facts averred by the plaintiff, and denied by the defendant, should be stated, and

2. For defendant.

"*Secondly.* Material issues on facts averred by the defendant, and denied by the plaintiff.

Material issues of law.

"The material issues of *law* arising upon the pleadings, and with reference to the decision which may be formed upon the foregoing issues of fact, are—

1st, _____

2nd, _____

3rd, _____

&c. _____

"(Under these heads are to be stated precisely the questions of law arising upon the issues of fact, as they may be determined affirmatively whether for the plaintiff or the defendant.)"

Minute must exhaust the whole case.

The Judge is absolutely precluded from entering into any investigation of the merits, until the preliminary points have been disposed of: but the intention of the Sudder Court is, that the Judge shall not upon this occasion rest satisfied with settling the issues on the preliminary points, but shall at once define, in this proceeding, all the issues which may be required to enable him to try the cause upon its merits, in case he shall overrule the preliminary objections.

Examples.

To apply this form practically:—Where A., a Hindoo, sues B. for the possession of land, alleging that Z. being proprietor of the land, died, leaving A. his only child and heir. B. replies that Z. was not proprietor at the time of his death, that A. was born blind, and therefore incapable, according to Hindoo law, of inheriting the land, even if it had belonged to Z. at the time of his death. A. denies that he was born blind, and insists that even if he had been so, he would not have been incapable of inheriting.

The material issue of fact averred by the plaintiff and denied by the defendant is, whether Z. was at his death proprietor of the land.

The material issue of fact averred by the defendant and denied by the plaintiff is, whether A. was born blind.

The material issue of law (which arises if it be found that Z. was proprietor and that A. was born blind) is,—

Whether a person born blind is incapable by Hindoo law of inheriting the land in question.

Again,—A. sues B. for the possession of land, alleging that C. being in possession, as widow, heiress and representative of a Hindoo proprietor, did for a purpose specified in the plaint grant to D. a mortgage of the land, with a power of private sale, and that D. sold the land to A. under that power.

The defendant denies that C. was the widow of the deceased proprietor; he denies that she executed the instrument in question; he insists that a power of sale, such as that which the plaintiff sets up, is contrary to the regulations, and he insists that even if C. had been the widow of the proprietor, and had executed the instrument, and if the power had not been contrary to the regulations, still C. as widow and representative, was not entitled by Hindoo law, to mortgage the property for the purpose specified in the plaint.

Here the material issues of fact averred by the plaintiff and denied by the defendant are—

1. Whether C. was the widow of the proprietor.
2. Whether she executed the instrument in question.

No material issue of fact is averred by the defendant and denied by the plaintiff.

The material issues of law (which arise if the issues of fact are found affirmatively) are—

1. Whether the power of sale is allowed by law.(*f*)
2. Whether C. as a Hindoo widow was entitled to mortgage the estate for the purpose specified.(*g*)

(*f*) Supra, p. 38. (*g*) Supra, pp. 62, 74, 115.

Irregular pleadings.

It is the duty of the Courts, and especially of the Zillah Courts, to check all irregular pleadings, and to point out to the notice of the Vakeels such parts of the pleadings as are evidently irregular, irrelevant(*h*) or otherwise objectionable, and to record their censure of any Vakeel who may offend in these respects: a Vakeel against whom censure has been thus recorded is liable to forfeiture of his fees, or to fine, on repetition of the offence.

The Judge must be careful to exclude no material issue of fact raised by the pleadings on either side: and previously to rejecting evidence to any point as unnecessary, he ought to consider whether or not it is probable that such evidence, although not deemed requisite for his own satisfaction, may be so deemed by the Court before whom the cause may be brought on appeal.(*i*)

If a Judge refuses to take evidence at all, upon a particular point, he must not afterwards decree on that very point, against the party whose evidence he has refused to take.(*j*)

Having considered and recorded in his own hand(*k*) the points in issue, the Judge proceeds to take the evidence which may be adduced by either party upon such points.(*l*)

As it is reasonable that after the Judge has fixed the issuable points, some time should be afforded to the parties to enable them to consider the evidence necessary under the several heads defined by the Judge at this preliminary hearing, it is the duty of the Judge, after the points to be established have been reduced into writing, to hold (on the same day as it would appear) a separate proceeding under Section 12, Regulation XXVI., 1814, calling on the parties to file on a fixed day(*m*)

(*h*) Reg. XXVII., 1814, Sec. 9, Cl. 3; Cir. Ord. 8th January, 1841; Cir. Ord. 15th January, 1841, para. 6.

(*i*) Cir. Ord. 25th October, 1822, para. 3; Cir. Ord. 8th May, 1850; S. D. 1850; April 6th, p. 104; 13th April, p. 109; Ibid, pp. 135, 136.

(*j*) S. D. 1847, 1st December, p. 619.

(*k*) Act XII., 1843, Cir. Ord. 16th August, 1844; Cir. Ord. 8th May, 1850; Infra Chap. XXVII.

(*l*) Reg. XXVI., 1814, Sec. 10, Cl. 3.

(*m*) Cir. Ord. 8th May, 1850.

their exhibits, and the names of their witnesses, in proof or in refutation of the points set forth, as above prescribed. Such proceeding ought not, however, to specify any particular exhibits or names, for the Judge must not call upon the parties to file particular documents, nor may he in any manner indicate the sort of evidence, oral or documentary, which should be adduced in support of their respective allegations; it is the privilege of the litigant parties to produce such proof as may best suit their own interests, and it is the duty of the Courts to receive it unless there be sufficient reason for rejection, and to judge accordingly.(*n*)

No party is allowed to plead as an excuse for neglecting to file evidence, that the Court did not specifically call for it; provided the Court has fixed issues under which the evidence might with propriety have been tendered.(*o*)

Consequences of not being prepared for hearing.

If either of the parties in a suit, which may be brought to a hearing after due notice, shall not be prepared to file their exhibits, or the names of their witnesses, or to furnish any explanations of the case which may be required by the Court, and shall not assign sufficient and satisfactory reason for the delay, the Court is authorized to impose upon them such fine as may appear just and proper; not exceeding one-fourth of the fee paid on the institution of the suit, or of the amount of the stamp duty substituted for such fee. If a similar neglect occurs a second time, after due notice of the day fixed for the case being again brought forward, the Court may either impose a second fine under the limitation above prescribed, or proceed as in other cases of default.(*p*)

Extra-judicial interference prohibited.

Judicial officers of every class are positively prohibited from taking cognizance of matters not set forth in the pleadings, and more especially from giving directions to one or both of the litigants to reinstitute proceedings after a particular

(*n*) Cir. Ord., 13th October, 1848; Cir. Ord. 8th May, 1850.

(*o*) S. D. 1849, 9th January, p. 13; Reg. XXVI., 1814; Sec. 10.

(*p*) Reg. XXVI., 1814, Cl. 3. See Index tit. default.

manner, to include other persons in the suit, and the like, and are required to confine themselves to the adjudication of the point or points at issue between the parties, as set forth by themselves. They have no authority to declare judicially that either party is entitled to bring his suit anew, or to point out the form in which it should be revived.(*q*)

No evidence on point not in issue.

No evidence is admissible except upon the points in issue.(*r*) Therefore in an action for recovery of a debt secured by bond, where the defendant denies the execution of the bond, and the issue is whether it be the defendant's deed or not, he cannot give a release of this bond in evidence; for that does not destroy the bond, but shews only that it is discharged; and therefore does not support his side of the issue.

Subsequent issues.

The duty of selecting the points of issue, is one for the discharge of which no rules can be laid down: every man will select the points which appear to him most material, and their materiality will appear in various lights to different minds, and perhaps even to the same mind at different stages of the inquiry. In order to meet this change of view, if the points originally fixed upon do not appear to be sufficient for the final determination of the matters in dispute, and if proof shall be required on any other points in the course of the trial, such additional points are distinctly recorded from time to time, on the proceedings, and the proper party is called upon for the requisite evidence, and no exhibit is allowed to be filed, or witness summoned, unless expressly in proof, or refutation of some point, upon which the Court may have directed that evidence should be taken.(*s*)

No evidence is received except on recorded issues.

The proceedings thereupon are of course similar to those which accompany the original selection of issues.

(*q*) Cir. Ord. 13th September, 1843, para. 1; S. D. 1849, 29th March, p. 86.

(*r*) See S. D. 1849, July 12th, p. 286.

(*s*) Ibid. Cl. 2, and 3 Moore's Ind. Ca. 278, 359. S. D. 1848, pp. 392, 454, 470, 479, 504, 596, 642, 651, 692, 693, 696, 698, 702, 711, 731, 883, 887, 889, 893.

It may, perhaps, not be wholly unprofitable to notice a few of the recent cases in which the lower Courts have been held, on appeal, to have miscarried in their selection of issues.

Instances of issues erroneously fixed.

Land was sold by public sale to A. as the lakhiraj land of B.: C. having interfered, A. sued C. for possession. C. replied that the land was not lakhiraj, but was subject to the payment of rent to him.(*t*)

Here it is evident that C.'s allegation, if true, affords no answer to A.'s demand of possession. It is therefore erroneous to take issue upon the question, whether the land be or be not of rent-free tenure. The point to be decided is, whether this is the same land which has been sold to A. If it is, A. is entitled to be put in the same plight that B. was in before the sale. If B. wrongfully held the land rent-free, A. can be sued in the usual way, as B. might have been, by the person seeking to subject the land to the payment of rent.

If the plaintiff alleges a right on his own part, and the defendant, admitting the right, pleads that it was relinquished in his favour by the plaintiff himself;—the question is, whether there has been such relinquishment, and not whether the right which both parties admit, is well founded.(*u*)

Where a man claims lands because they are included in a lease to him, the question is whether those very lands are, or are not comprised in his lease, and not whether he has more land in his possession than are mentioned in his lease.(*v*)

If a man sue for the value of his crops forcibly cut and carried off by the defendants, it is enough for him to shew that the crops were his; that they were illegally carried off, and that the defendants were concerned in the aggression—and it is unnecessary for him to prove by what title he holds the lands, or to shew what quantity was cut and in what manner carried off by each individual.(*w*)

(*t*) S. D. 1848, 26th February, p. 116.

(*u*) S. D. 1848. 22nd July, p. 797; 16th March, p. 213, 25th March p. 240.

(*v*) S. D. 1848, 28th December, p. 888.

(*w*) S. D. 1848, 29th December, p. 893.

So if the plaintiff sues for damages for injury done to his crops by a certain proceeding of the defendant, which caused them to be inundated, the question of damages is the question to be decided, and it is erroneous if the Court, without pronouncing any opinion upon that point, states in its decree, that the real question at issue is a boundary dispute, and refers the plaintiff to an action to settle the boundary.(*x*)

Where the ground of complaint is,(*y*) that the defendant has encroached upon the public road by the erection of a wall, the only issue is one of fact, viz. whether the wall stands upon what was previously the public road. It is erroneous to decide the cause upon such grounds as these, that the road now existing is broader than an adjoining road, or that the wall complained of does not obstruct the free passage of men and beasts.

Where documents which form the foundation of the claim of one party, are alleged by the opposite party to have been executed in furtherance of a fraudulent purpose, the honesty or dishonesty of the transaction is the point in issue, and it is erroneous to decide in favour of the claimant merely upon proof of the execution of the deeds.(*z*)

In a suit to assess rent, where the defendant alleges that his tenure is exempt from assessment, as having been held rent-free from a period previous to the 12th August 1765, the date of the Company's accession to the Dewanny; the question in the cause is, whether the land has been held rent-free during the period alleged and it is error if this be not fixed as an issue.(*a*)

Where a man sues to recover money advanced by him to the defendant on security of a lease of lands under which he has himself been in possession, and the defence is that he has been reimbursed by the profits of lands during his occupancy;(*b*) this plea must be enquired into, and it is erroneous to

(*x*) S. D. 1847, 7th January, p. 7.
(*y*) S. D. 1848, 16th March, p. 202.
(*z*) S. D. 1848, 12th September, p. 815.
(*a*) S. D. 1850, 26th March, p. 72.
(*b*) S. D. 1847. 15th May, p. 291.

decree for the plaintiff, and to leave the defendant to establish his set-off in a cross suit.

In distinguishing the real points in issue, and in deciding upon them, a close attention to the pleadings will generally guide the Court safely, and most of the miscarriages in this respect seem attributable to the want of an attentive analysis of the opposite allegations.

Duty of the Judge to exhaust all sources of information.

Although the Judge is not at liberty either to prescribe or to suggest to the parties the particular evidence by which they are to substantiate their allegations, it is yet considered to be his duty to take a more active part in the investigation than usually falls to the lot of Judges in other countries: and indeed a case will be remanded by the appellate Court, if it does not appear by the proceedings that the Judge has resorted to all reasonable means of informing himself of the truth.

If, for instance, the case turns upon the question, whether the surrender of a lease was completed according to the usual practice in such cases,(c) or whether a lease be genuine,(d) or whether a defendant has been adopted into another family and has thus ceased to be responsible for his father's debts,(e) or upon the value of certain articles at a particular place and time:(f)—In such cases the Judge is himself to state minutely the points on which he requires evidence to be adduced, and the public records, if any, which he requires to be searched: and he is responsible for the incompleteness of the investigation, unless where he has thus called for evidence, and the parties have failed to produce it; for the parties cannot adduce evidence on any point not laid down in the proceeding of the Court.(g)

(c) S. D. 1847, 7th January, p. 7.

(d) Ibid, p. 8, S. D. 1848, 28th March, p. 245.

(e) S. D. 1848, 15th January, p. 15.

(f) S. D. 1849, 8th May, p. 139.

(g) S. D. 1848, 5th July, p. 651.

Wherever any thing(*h*) appears on the face of the proceedings which naturally and obviously suggests inquiry, such as an admission of the existence of a document, which, if produced, might throw light upon the merits of the case, it is the duty of the Court itself to inquire further.

(*h*) S. D. 1848, 3rd May, p. 396.

CHAPTER XX.

HOW AND BY WHOM THE FACTS IN A CAUSE ARE TO BE ESTABLISHED.

THE Judge must not only consider what are the points upon which the case really turns, but also how far the facts which he deems material have been already substantiated, and how far it is necessary for the parties to offer evidence in proof of them.

The parties themselves are interested in drawing this distinction before the case comes before the Court.

Effect of answer confessing plaintiff's case.

The plaintiff, after reading the answer of the defendant, is to consider what his own future proceedings shall be. Even if the answer admits the justice of his demand, and consents that judgment shall pass accordingly, the plaintiff, though he need not file a replication, must still prove his claim by evidence as in cases decided *ex-parte*,(*i*) but no evidence is admitted in refutation of it, and a defendant who has once admitted the plaintiff's claim is not allowed to withdraw that admission.(*j*)

In such a case the plaintiff files no replication, but proceeds in due course to adduce his evidence.

Effect of admissions in hostile answer.

But an answer which is essentially hostile may contain admissions which tell very strongly in support of the plaintiff's case, and it is unnecessary for the plaintiff to offer proof of that which is admitted by his adversary.(*k*)

Facts established by the pleadings.

It is therefore important for the plaintiff to ascertain the real extent of the admissions (if any) in the answer; for if he

(*i*) Supra, p. 180, Cir. Ord. 25th November, 1847, para. 2; R. S. C. 15th June, 1846, p. 80.

(*j*) Sel. Rep. 24th March, 1831, v. 5, p. 105.

(*k*) See (*e. g.*) S. D. 1850, 2nd April, p. 89; 20th April, p. 133; Cir. Ord. 8th May 1850.

does not by his replication controvert the statements of the answer, the inference will be that they are true.

What the replication should contain.

He must therefore see whether the effect of the defendant's admission is impaired or destroyed by any new matter with which it may be coupled. If such be the case, he should in his replication deny the untrue statements of the answer, and should prepare to establish his own case by proofs; or, where the affirmative must be established by the defendant, he should put him to prove it.

The first consideration with both parties must be, what is necessary to be proved; they must then ascertain how it can be proved.

Although the Judge selects the issues and the main facts to be established on either side, the parties themselves, if they understand their case, will enable him by their explanations to do so in a more satisfactory manner.

Facts of which the Court takes judicial notice.

There is a class of facts of which the Court takes judicial notice; facts which it recognizes without requiring the parties to prove them.

Public rights.

The public tribunals notice the existence and titles of all the sovereign powers which are recognized by the Government, the doctrines of the law of nations, the maritime law, the articles of war, the proclamations of the Governor General, being acts of state, the fact(*l*) that the opium sold at the public sales of the Government is the property of the Government of India, and that the proceeds of the sale form part of the public revenue; the customs and usages of Hindoos and Mahomedans generally, and in certain cases, the customs and usages of Hindoos and Mahomedans prevailing in particular districts or among particular sects.

Religious customs & usages.

Facts depending on the course of nature.

It is unnecessary to prove facts which may certainly be known from the invariable course of nature, such as that a

(*l*) Ramloll Thakoorsey Dass *v.* Soojunmull Dhondmull, 4 Moore's Indian Cases, 339.

man is not the father of a child, if he has been absent from the country for the twelve months immediately preceding its birth; nor is it necessary to prove the course of the heavenly bodies, nor the ordinary public fasts and festivals, nor the coincidence of one with another of the various eras current in this country, nor the order of the months, nor the meaning of words in the vernacular language, nor the value of the coin of British India, nor any matters of public and general history.

Meaning of words in the Vernacular.

It may be matter of inquiry what era is current in a particular district; all contracts having reference to time are governed by such era, unless otherwise expressed.(*m*)

Territorial extent of British sovereignty.

Divisions of the country.

The Courts also notice the territorial extent of the jurisdiction and sovereignty actually exercised by their own Government, and all the local divisions of the country, which have been made for political, judicial, financial, or military purposes, or for purposes of police. But the Courts cannot recognize without proof, the precise boundaries (*n*) of such territories and divisions, any further than they may be described in public treaties or in the public acts or regulations of the Government.

Constitution and departments of Government.

The Courts will recognize the political constitution and frame of their own Government, the assumption and resignation of power by Governors General and Deputy Governors, by the heads of departments and the principal officers of the Government; or the existence of a war in which the Government of India, or the British Crown, is engaged; and in short all matters which affect the Government of the country.

Common presumptions of law.

They absolutely adopt those presumptions which are ordinary presumptions of law,—as that a man is innocent till the contrary be shewn, and that all official acts have been done in due form.

Course of proceedings of other Courts.

The Civil Courts are bound to notice their own rules and course of proceeding, and those of all other Courts subject to the same Sudder Court, and also the limits of the jurisdiction

(*m*) R. S. C. 11th January, 1848, p. 124.

(*n*) See p. 29, Supra.

of the Supreme Court; and they ought to notice who are the Judges of all the Courts, for the appointment of Judges is a matter of general notoriety.

The Judge may inform himself where he pleases.

In such cases, where the memory of the Judge is at fault, he resorts to those sources of information which he may deem worthy of confidence.

Thus if the point at issue be a date, the Judge will refer to an almanack; if it be the meaning of a word, to a dictionary, or to the explanation of one versed in the language. The parties, though they are not to be called upon for evidence on such subjects, ought yet to be prepared to assist the inquiries of the Judge by producing the necessary books or documents.

But the Judges ought at all events to make the necessary inquiries, without strictly confining themselves to the time of the trial; thus, where the question is whether a particular prince or state is recognized by the British Government as independent, the Judge, if he feels any doubt, may refer to the Sudder Dewanny Adawlut, which applies for information to the department of the Government within whose province the subject actually falls.

If a doubtful question of Hindoo or Mahomedan law should arise, the Judge must call for the opinion of the pundit or cazi of the division.(*o*)

Reference to Collector.

Where the plaintiff and the defendant both claim the land in dispute, under leases alleged to have been granted to them by Government, and either party demands that the Collector may be referred to as to the truth of his statement, it is the duty of the Court to make such reference.(*p*)

Admissions on the record.

The easiest mode of proving facts not judicially noticed, is by admissions on the record, that is to say, statements made by either party in the course of the pleadings, and which may be taken, as against such party, to be true.

(*o*) S. D. 1848, 7th January, p. 7; 15th January, p. 15; 23rd February, p. 106.
(*p*) S. D. 1848, 2nd May, p. 394.

Statements in plaint are constructive admissions in favour of defendant.

The facts alleged in a plaint, where they are alleged positively, amount (though perhaps they were not so intended) to admissions, which the defendant may insist upon in his own favour if he thinks it expedient to do so, and they need not be proved by any other evidence than that of the plaint itself; for whether they be true or not, the plaintiff, having once stated them to be true, and thus induced the defendant to abstain from taking any steps to prove them, cannot afterwards dispute them.(*q*)

What are actual admissions on the record.

Besides statements of this kind, which are construed to amount to admissions as against the party making them, there may be express admissions on the record intended to be actual acknowledgments by one party of the absolute or partial(*r*) truth of facts which the opposite party has alleged.

How far plaint is evidence for complainant.

The complainant cannot adduce any part of his own plaint as evidence in support of his case, unless where it is corroborated by the answer; as, where the plaintiff states a deed or will, and the answer admits the deed or will to have been properly executed, and to be to the effect asserted in the plaint; the plaint is evidence for the plaintiff to the extent of the admissions made by the defendant, and so far as he has referred to it in his answer, and has thereby, in effect, made it part of his answer: and the genuineness and authenticity of a written instrument thus admitted, cannot be controverted by either party, or by the Judge in his ultimate decision.(*s*)

So, if the defendant pleads that he paid the debt in respect of which he is sued: this is an admission of that the debt was contracted by him, and the plaintiff need not prove it; but the defendant may prove payment if he can.

Effect of replication on answer.

Although a plaintiff by his replication denies the truth of the defendant's answer, generally, he does not thereby preclude himself from relying upon its admissions in support of his case. This applies to admissions in a suit which is defended;

(*q*) S. D. 1849, August 29th, p. 374; March 31st, p. 89.

(*r*) S. D. 1847, 11th September, pp. 536, 541; See Sel. Rep. 18th May, 1841, v. 7, p. 31.

(*s*) S. D. 1848, 8th March, p. 141.

for in suits where the answer confesses judgment, the plaintiff must still prove the material facts upon which he relies.(*t*)

It is hardly necessary to observe that the meaning and effect of a plaint or answer, and the true extent of the admissions therein contained, can only be ascertained by examining the whole and by carefully comparing the several parts of it with each other.

Faint admissions against one's own interest are sufficient.

Admissions, even though faintly worded, and short of a positive avowal, will be held sufficient as against the party who makes them, for it is generally found that a man denies with all the vigour which the circumstances warrant, any fact that militates against his own interest.

Thus a statement by the defendant that he believes that such a fact is true, is sufficient to establish the fact as against him, unless the statement is coupled with some clause to shew that it is not intended as an admission; for it has been said that what the defendant believes against his own interest, the Court will likewise believe; but a mere statement by the defendant that he has been informed that such a fact is true, without any expression of his belief concerning it, is not such an admission as can be deemed to prove the fact.

Admissions by implication.

And so where a defendant, without expressly admitting the truth of a statement in the plaint, makes a defence which impliedly admits the statement, and offers some new matter to do away with its effect—this admission may be as effectual an admission in the plaintiff's favour, as if it were an express admission. Thus where a man sued(*u*) certain persons for cutting and carrying away the entire crop on certain lands, cultivated by them under the bhaolee tenure, according to which the zemindar and the tenant divide the crop; the cultivators replied that the plaintiff had not supplied them with seed at the proper time, that when he did give it, the

(*t*) Supra, p. 219.

(*u*) S. D. 1847, May 31st, p. 184.

seed was bad, that in consequence of this the produce was very trifling, and that, owing to the late sowing, the crop, such as it was, was destroyed by the rains;—this answer was considered to amount to a clear admission of the bhaolee tenure.

Answer of one defendant is not evidence against another.

The answer of one defendant cannot be used for the purpose of affording evidence, either in the way of admission or of positive averment, against another; because there is no issue between the parties, one does not seek the aid of the Court against the other, and they do not litigate questions as between themselves, with the advantage of knowing each other's case and of taking the usual precautions which hostile parties take: and therefore each cannot bring the statements of the other to any accurate test.(*v*)

Otherwise where he refers to answer of co-defendant.

But if a defendant by his answer refers to the answer of a co-defendant as giving information which the defendant himself is unable to give, the answer of that co-defendant may be used against the defendant referring to it.

A defendant cannot sue against plaintiff the answer of his co-defendant.

If a suit be brought against several defendants, to recover damages for an injury alleged to have been committed by them, the answer of one of the number, alleging that he alone committed the whole of the acts complained of, will not prevent the plaintiff from offering evidence to shew that they all joined in the trespass: for if it were otherwise, they might get rid of their own liability, and deprive the plaintiff of redress, by procuring such an admission from one co-defendant, who may have no means of paying the demand.(*w*)

Admissions not in the pleadings,

Another mode of establishing facts is by admissions which for the sake of saving expense or of preventing delay, the parties or their Vakeels or agents mutually agree to make.

Should be signed.

Such admissions ought to be perfectly clear and distinct: they ought to be in writing and signed by the parties or their Vakeels or authorized agents.

(*v*) Supra, pp. 45, 96, 97, 98.

(*w*) Sel. Rep. 14th June, 1847, p. 339; See Sel. Rep. 18th May, 1841, v. 7, p. 31.

Must not be to set aside a known rule of law.

The Court will not sanction an agreement by which any of the known rules of law are evaded. Where the law requires an instrument to be stamped in order to its validity, the Court will not give effect to an agreement to waive the obligation arising from its not being stamped, for thus litigants might by mutual agreement repeal the stamp laws entirely.(*x*)

Admissions by Vakeel.

A Vakeel may, by his admission made with due authority, bind his client, though the latter is not present at the time of making it.(*y*) So he may by his consent bind his client to adopt that version of the story which the opposite party shall give when put to his oath,(*z*) and the client cannot object to a decree passed upon such statement.

Admissions of matter of fact, made in open Court by the Vakeel of either party, in answer to questions put by the Judge, and recorded by the Judge, are binding upon the party.(*a*)

Were this rule not established, it would not be safe for the Court to deal with any agent or pleader, but the parties themselves must be called upon to appear, even in the most trifling matters.

Where they would not be binding.

If, however, it were clearly proved that a Vakeel made any admission, or gave any consent, by collusion with the opposite party, the Court would not hold the client bound by it.(*b*)

What must be proved by adducing evidence.

All essential facts of which the Courts do not take notice, and which are not admitted between the parties, in any of the ways abovementioned, must be proved by evidence.

On whom the burden of proof rests.

A disputed fact ought, generally speaking, to be proved by the party who affirms its truth, because the assertion that a fact is true, is capable of more direct and simple proof than

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(*x*) Supra, p. 198.

(*y*) Rajunder Narain Rae, *v.* Bijai Govind Sing, 2 Moore's Indian Ca. p. 181; See Sel. Rep. 29th August, 1843, v. 7, p. 130; S. D. 1849, September 6th, p. 382. See p. 481.

(*z*) S. D. 1849, May 15th, p. 151; S. D. 1848, June 24th, p. 586; Supra, p. 195.

(*a*) Sumboo Chunder Chowdry, *v.* Naraini Dibeh, 3 Knapp's Rep. pp. 55, 60; Supra, pp. 106, 107, 208,

(*b*) 223. S. D. 1849, p. 382.

the denial of it: and because it is reasonable that the party who relies upon the existence of a fact, should be called upon to prove his own case.

Party supporting the affirmative.

The burden of proving that a compromise has been obtained by intimidation and false representation, is cast upon those who seek to impeach the validity of their own deed.(*c*)

On person controverting a *primâ facie* right.

In general wherever a *primâ facie* right, a right which if not qualified or affected by any other right, is sufficient to warrant the conclusions which the party draws from it, is admitted or proved, the person who asserts that it is so qualified or affected, must prove his assertion.

On person out of possession.

Where one man seeks to recover from another, property of which the latter is in possession,(*d*) or to establish a title in himself, to land which has been purchased, and conveyances made out in the name of another man,(*e*) the burden of proof lies upon the plaintiff.

On person pleading exemption from general law.

In cases where the claim is preferred on general unquestionable grounds, such as inheritance, and the defendant pleads a special ground, then of course the burthen of proof is on the defendant, and his plea must be investigated.(*f*)

On Hindoo brother alleging partition or separate property.

Where one of two brothers sues the other for one-half of the joint estate, and the defendant alleges that there has been a partition, he must prove the partition: and where it is alleged, on either side, that property which belonged to a member of a joint and undivided Hindoo family was separate and not joint property, the burden of proof rests upon those who assert its separate character.(*g*)

Burden of proof in suits for payment of rent.

Where a man has proved himself zemindar, an occupant who resists his claim of rent on the ground that he has paid it already, or that he has been ousted from the lands comprised

(*c*) Rajundernarain Rae *v.* Bijar Govind Sing, 2 Moor's Indian Ca. 181.

(*d*) Ram Rutton Rae *v.* Furrookoonnissa Begum, 4 Moor's Indian Cases, 233.

(*e*) S. D. 1850, 2nd April, p. 89.

(*f*) S. D. 1849, July 12th, p. 286.

(*g*) S. D. 1849, May 15th, p. 151; Strange's Hindoo Law, p. 225, 2nd ed.; Dhurm Das Pandey *v.* Mussumat Shamasoondri Dibiah, 3 Moore's Indian Cases, 229. Supra, p. 79.

in his holding, must prove that he has paid the rent, or that he has been ousted(*h*) and an occupant who claims to hold land as lakhiraj, must prove its exemption.(*i*)

In suits to enhance rent. In Bengal.

It has been laid down, with respect to the Lower Provinces, that where a suit is brought for enhancement of rents, the defendant who pleads a mocurruree tenure, must prove his right to hold at a fixed rent, exempt from enhancement, unless he be a talookdar of the kind specified in Section 51, Regulation VIII., 1793. But where the zemindar demands an increase of rent from a dependent talookdar, recognised as such at the time of the decennial settlement, and holding his lands at an ascertained rent, in such cases it is for the zemindar himself to prove his right to an augmentation of rent.(*j*)

These rules, however, may require considerable modification when the Courts have to deal with claims similar in name, but relating to a different system of land tenure, and to a different revenue settlement.

In the North-Western Provinces.

In the North-Western Provinces there are(*k*) two classes of non-proprietary cultivators. One consists of those who are merely tenants at will, and who hold on from year to year at the pleasure of the zemindar. The zemindar who sues to oust a tenant of this class or to raise his rents, generally obtains a decree in his favour at once, upon the production of the record of settlement.

The constitution of the other class is not precisely defined, but it would seem to comprise those who have overcome great natural obstacles in reclaiming the land from waste, those who have expended capital upon it in a permanent form, and those who hold by prescription under long continued occupancy.

Tenants of this class have a *primâ facie* right to protection, and when the zemindar seeks to raise their rents, the burden

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(*h*) S. D. 1848, 8th March, p. 142.

(*i*) Sel. Rep. 14th March, 1848, v. 7, p. 472.

(*j*) Sel. Rep. 10th August, 1847, v. 7, p. 378; S. D. 1848, June 7th, p. 515.

(*k*) See Calcutta Review, vol. 12, p. 447.

of proof rests upon him. He must establish either that the present rents are inadequate as compared with those paid in the neighbourhood; or that the tenure has increased in value in consequence of improvements effected by himself or by the State, or that some other permanent change has occurred which entitles him to demand more from the land than he has hitherto received.

Limitation.

A plea of limitation must be established by the party advancing it, and the proof rests wholly on him.(*l*)

Proof of lakhiraj tenure before grant of Dewanee.

All grants for holding land in Bengal exempt from the payment of revenue, made previous to 12th August 1765, when the British Government obtained the Dewanee, are to be established by proof that the grantee actually and in good faith obtained possession, previous to that date, of the land so granted. It is immaterial whether the grant was with or without writing; nor need the competency of the authority be established.(*m*)

Burden of proof of money demands.

It is always for a rent-payer or any other debtor to prove the payment of the money which he owed :(*n*) and where a debtor has given mere *primâ facie* evidence of payment, which has been rebutted by contrary evidence, the debtor has failed to discharge himself.(*o*)

Documentary evidence.

When documentary evidence is contested, the proof of its genuineness lies upon the person who produces it.(*p*)

A deed or instrument is treated by the Court as being what it purports to be, unless the contrary is shewn: and therefore it is incumbent on the party impeaching it to shew that it is not what it purports to be.

Thus where an action is brought upon a bond, which is upon the face of it a common money bond, and the defence is that this instrument was in truth a mere indemnity bond, and

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(*l*) S. D. 1847, 31st July, p. 378; 2nd December, p. 622.

(*m*) Reg. XIX., 1793, Cl. 1, Sec. 2; Reg. XIV., 1825, Cl. 2, Sec. 3; S. D. 1847, 31st May, p. 183; Supra, p. 216, p. 78.

(*n*) S. D. 1847, December 1st, p. 618; S. D. 1849, September 4th, p. 379.

(*o*) 3 Moore's Indian Cases, p. 347.

(*p*) S. D. 1847, 7th April, p. 104.

not a bond intended to create an immediate debt; the burden of proving it to be an indemnity bond lies on the party who seeks to restrict its operation.

Allegation that a transaction was illegal.

Where a transaction apparently legal—such as a transfer of property, is impeached on the ground that it was effected under circumstances which made it illegal,—as that it took place after a declaration of insolvency; the circumstances importing illegality must be proved by the party alleging them.(q)

Fact against legal presumption must be proved by party asserting it.

Wherever the presumption of law is in favour of one party, it will be incumbent on the other party to disprove it, though in so doing he may have to prove a negative. If the question turns on the legitimacy of a child; if a legal marriage is proved the legitimacy is presumed, and the party asserting the illegitimacy ought to prove it by adducing irresistible evidence that it could not be the child of the alleged father; as, for instance, that he was absent from the country for the whole of the year next preceding its birth.

Insanity: burden of proof where party was treated as insane.

If a man seeks to impeach a will or other instrument, on the ground that the party who executed it was insane at the time;—where a person has been subject to the custody of a guardian appointed by the Court of Wards, or to a Commission of Lunacy in the Supreme Court, or to any restraint permitted by law, even a domestic restraint, clearly and plainly imposed upon him in consequence of undisputed insanity;—the duty of shewing general sanity, or a lucid interval of sanity at the date of the particular transaction, is thrown upon those who maintain the validity of the instrument.

Where party has been reputed sane.

On the other hand, where insanity has not been imputed by friends and relatives, or even by common fame, the proof of insanity which does not as yet appear ever to have existed, is thrown upon the party asserting it, and it must be distinctly proved to have existed at the particular date of the transaction which is impugned on this ground.

(q) S. D. 1847, 5th April, p. 100.

It will be presumed, until the contrary be shewn, that persons who enter into a contract are of full age, that a man duly executes his office, that a workman has duly performed the work entrusted to him by his master, and has not produced an imperfect article.

Presumptions.

A man must prove what lies peculiarly within his own knowledge; and if he fails to do so, the Courts will adopt that presumption which is least favourable to him.

Facts lying within knowledge of party.

Where a man has caused the crops and personal property of another to be illegally attached, he must prove that he restored them, or he will be liable to make good their value.(r)

And where a party, by his own act, deprives his opponent of the means of proving his case; as where he detains the property of another and refuses to produce it, or to give any evidence as to its value; the Court will presume every thing against the party who acts thus, and will award damages upon the assumption that the article so kept back was of the highest value that such an article can reasonably bear.

Party destroying his adversary's proof.

It is not always obvious at first sight which is the affirmative and which the negative proposition in a cause, for that which is substantially affirmative may be negative in form. The plaintiff sometimes grounds his right of action on a negative allegation, as for instance on the allegation that his Vakeel did not use due diligence in conducting his cause, or that a tenant who was bound by his lease to keep a house in repair, has not so kept it.

Where it is doubtful which is the affirmative proposition.

The best tests for ascertaining upon whom the burden of proof lies are, to consider which party would succeed if no evidence were given on the other side: and to ascertain what would be the effect of striking out of the record the allegation which is to be proved. The burden of proof must be on the party which would fail, if either of these steps were taken.

Tests.

It will be plain that in the case supposed above, if no evidence were offered to prove that the Vakeel did not do his duty,

(r) Sel. Rep. 6th January 1848, v. 7, p. 423.

or that the tenant did not repair the house, or if those allegations were struck out of the record, the plaintiff's case could wholly fail. It is therefore the plaintiff's duty to substantiate them.

Claim depending upon a negative.

And so where a claim depends in some degree upon a negative, reasonable proof must be given of it, as where the plaintiff has to make out a pedigree as heir, and has to shew that the elder branches of the family have become extinct: he may succeed upon slight evidence, such as reputation in the family, that the persons supposed to be extinct have been long absent and unheard of, and that no report of their being married or having issue has reached the family.(*s*)

Not necessary to put in issue the details of the evidence.

The rule, that no evidence will be admitted to prove any facts but those which are mentioned in the pleadings and selected by the Judge, requires only that the main facts themselves should be put in issue, and not the materials of which the proof of those facts is to consist, and therefore such particulars may be admitted, in proof of the general facts.(*t*)

If it be alleged in the pleadings that A. is the son of B.; the fact to be proved is the relationship of A. to B.; and that may be done by any mode of proof which the rules of evidence will allow, and it is not necessary to state the mode upon the record.

Where particular facts may be given in evidence under general charge.

Where the charge in the pleadings is, that a man is insane, or is addicted to drinking, such assertions are to be proved by giving in evidence particular acts of madness, or particular instances of drunkenness.

Plaintiff need not establish more than is required to found decree.

It is not necessary for the plaintiff, however strong his case may be, to allege or to establish more than what is requisite to entitle him to the decree which he seeks.

Thus when the suit is for an account, and the account is of a kind which must be referred to some Officer for special investigation,(*u*) all the evidence that need be adduced at the hearing

(*s*) Infra, Chapter XXI.

(*t*) Supra, p. 191.

(*u*) See Chap. XXIII. Infra.

is that which proves the defendant to be a party liable to account to the plaintiff; and then the decree to account follows of course.

Party must not set up one case and prove another.

It is not only necessary that the substance of the case set up by a party should be proved; it must be essentially the same case, and not a different case; for the Court will not allow a man to be taken by surprise by a case proved on the other side, which, though plausible in itself, is substantially different from that which was set up in the pleadings.

There must be a direct and real conformity, though not perhaps a minute literal conformity, between the proofs and the pleadings; parties who come for the execution of agreements must state them as they ought to be stated, and not set up titles which, when the cause comes to a hearing, they cannot support.

Not to set up general title and prove special title.

Thus a party should not set up a general title, such as inheritance, and then seek to recover under a particular deed merely.(*v*)

Nor set up special title and prove general title.

Where the plaintiff sues on a special ground, such as an *oonomuttee putr*, or deed granting power to adopt, the Judge should confine himself to the investigation of that point only; and, on its not being established, he should simply dismiss the suit. He should not decree any portion of the property in suit, on a ground totally different from that on which the claim was preferred,—that is to say, upon the general right of inheritance, when the claim was founded on right to adopt, which was rejected as invalid.(*w*)

A party is not to prove facts inconsistent with his allegations.

A party cannot be allowed to prove facts inconsistent with his case as stated in the pleadings. It must be decided with reference to the allegations upon which he has himself rested it; and when his averments have been of an original and exclusive right and unbroken possession on his part, no pre-

(*v*) Sel. Rep. 19th September, 1831, v. 5, p. 143.

(*w*) S. D. 1849, July 12th, p. 286; December 24th, p. 483.

sumptions of his having acquired the property by purchase or in any other manner can avail him.(*x*)

Where plaintiff's case fails, defendant's need not be gone into.

In cases where the burden of proof rests manifestly upon the plaintiff, if the plaintiff do not establish the special grounds on which he comes into Court, there is no necessity to investigate the grounds upon which the defence rests.(*y*)

When a man advances one set of claims and establishes another, Judges are very often tempted to take irregular courses for the purpose of saving further litigation. But it is reasonable and just that the right of parties litigating should be decided *secundum allegata et probata:* and attempts to reach the supposed equity of each case by departing from the rules which have been established for the purpose of maintaining and administering justice, generally lead in the particular cases to results, which were never contemplated, and introduce disorder, uncertainty and confusion into the general practice of the Courts.

(*x*) S. D. 1849, August 29th, p. 374; 31st March, p. 89.

(*y*) Ram Rutton Raee *v.* Furrookoonnissa Begum, 4 Moore's Ind. Cases, p. 233.

CHAPTER XXI.

EVIDENCE.

THAT which (independently of all argument and comment) is legally offered by a litigant party in order to convince the mind of the Court, that the facts alleged by him are true, is said to be evidence: and the evidence amounts to proof, when it is sufficient to produce the desired conviction in a mind intelligently and justly exercised.

What is evidence.

What is proof.

The truth of a past occurrence may generally be best learnt from those who saw it; and next best from those to whom they have stated what they saw.

The natural course of inquiry into a past transaction.

Men naturally tell the truth where they have no special motive to falsehood; and naturally believe the statements of other men as to what they know, if there be nothing to excite suspicion.

If more direct information cannot be had, it is natural to inquire what circumstances accompanied the transaction, and to infer the unknown facts from the known ones, according to previous experience.

Circumstantial evidence.

Such is the order of inquiry which the Courts endeavour to pursue, but many are interested in obstructing and misleading them; they are generally obliged to decide quickly, and with little knowledge of the real value of any man's testimony, especially where they do not see the witness, and observe his demeanour.

Stricter evidence required in judicial proceedings.

The Courts, then, would be more liable to be misled than persons in private life, unless the reception of evidence were subjected to some rules which may tend to guard them from error.

It is proposed to enumerate briefly some of the most important of these rules.

The best evidence must be produced.

Every fact ought to be established by the best evidence that the case admits of. Until it is shewn, that the party who undertakes to prove a fact, is unable to obtain that original or primary evidence which affords the greatest certainty of the fact in question, no evidence ought to be received, which is merely secondary or derivative: for where the original evidence is withheld, it is natural to suspect that the party is afraid to produce it.(*z*)

Where secondary evidence of oral testimony is admitted.

Accordingly, so long as a man can be called to give his testimony in person, the Courts do not receive secondary evidence of what he formerly stated upon oath regarding the matters in issue: whether such secondary evidence consist of a copy of his deposition, or of the statement of persons who were present when he was examined.(*a*)

The inability to call him may be owing to his death, or incurable illness, or insanity, or to his being absent from the country, or being kept out of the way by the contrivance of the opposite party, or missing, so that he cannot be found.

The existence of some such impediment must be proved before secondary evidence of his former testimony is given, and the Court will not presume the man's death or removal, or any other obstacle, even although many years may have elapsed since the date of his former testimony.

Under what circumstances the original testimony must have been given.

Where a witness has given his testimony upon oath, or upon the usual(*b*) declaration in lieu of an oath, in a proceeding of a judicial nature, either in a Civil Court, or before the revenue or criminal authorities, to which proceeding the party

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(*z*) S. D. 1848, 26th April, pp. 368, 370.

(*a*) S. D. 1849, 26th December, p. 486; S. D. 1848, 16th February, p. 82; S. D. 1847, 20th February, p. 58; 13th May, p. 150; 12th June, p. 247; Sel. Rep. 6th July, 1847, v. 7, p. 352; Ibid, 23rd September, 1847, p. 398; S. D. 1850, 8th April, p. 105; Rany Pudvamati *v.* Baboo Doolar Sing, 4 Moore's Indian Cases, pp. 259, 284.

(*b*) S. D. 1848, February 21st, p. 100.

against whom his testimony is offered in the second suit was legally bound to submit, and in which he had the power to cross-examine the witness;(c) should it be impossible, from some of the causes abovementioned, to call the witness himself, his testimony, so given, will be admitted in any subsequent suit between the same parties, or those claiming under them, provided it relate to the same subject, or substantially involve the same material questions.

A proceeding before the Collector to have one man's name registered instead of another, as proprietor of a zemindary, is not a judicial proceeding.(d)

But secondary evidence of testimony cannot be received under circumstances that would exclude the original testimony itself. Where depositions have been taken, either by parties not legally authorized to take them, or without the sanction of an oath or declaration, or where they have been taken in the absence of the party against whom they are offered, the depositions cannot be received.

Such evidence admissible where there was the opportunity of cross-examining.

Evidence of this kind is admitted against persons who had an opportunity of cross-examining the witness in the former suit, although neither the parties nor the points in issue, in the two proceedings, be precisely the same. Therefore, where a witness has testified in a suit, in which A. and several others were plaintiffs, and B. defendant; his testimony is after his death admissible in an action relating to the same matter, brought by B. against A. alone. And if the second trial is between those who represent the former parties, and who claim through them by some title acquired subsequently to the first trial, the evidence is admissible. Again, if in a dispute respecting lands, any fact comes directly in issue, the testimony given to that fact is admissible to prove the same point, in another action between the same parties, or those who claim through them, though the last suit relate to other lands.(e)

Admissible as between representatives of former parties.

A fact in issue proved in former case is evidence in suit for other property.

(c) See 4 Moore's Indian Cases, p. 284.

(d) See the case last cited.

(e) See S. D. 1849, 31st March, p. 89.

Where the point in issue, was, whether certain land was liable to assessment according to ordinary rules, or was held at a fixed annual jumma under a particular deed, the Zillah Judge decided against the validity of the deed; but, an appeal being lodged, the party claiming the right to assess executed a written acknowledgment that the lands were mokurruree, and that they should be held by the occupier at fixed rent: a razeenamah, or deed of compromise and acquiescence, was filed in the Court of Appeal on the basis of this acknowledgment.(*f*) The question of assessment having been raised again between the parties, it was held that the original adjudication against the deed fixing the jumma, was no bar to an inquiry into the validity of that deed in the subsequent suit.—Here it will be observed that by the arrangement the validity of the mokurruree tenure had been conceded, and the appellant had thus been induced to forego his appeal, in which he might have established the tenure.

Document once established cannot be questioned.

Where the genuineness of a document has once been established in a judicial proceeding, it cannot be again disputed in any suit between the same parties, or their representatives.(*g*)

Old evidence not admissible where new suit is not between same parties.

Where the second suit is not between the same parties as the first, nor between persons claiming under them respectively, evidence taken in the first suit cannot be used even before the same Judge,(*h*) against a party to the second who was not party to the first: and as he cannot be bound by it, so neither can it be used by him against his opponent who was party to the former suit.

Depositions previously taken, are open, when admitted as evidence, to all the objections which might have been urged had the witness himself been personally present.

The actual signature of documents to be proved.

The party producing a document as evidence, must prove that it is written or signed by the person by whom it purports to be written or signed. This is generally proved (in the case

(*f*) Sel. Rep. 14th January, 1823, v. 3, p. 200.

(*g*) S. D. 1848, 17th June, p. 542.

(*h*) Sumboo Chunder Chowdry *v.* Naraini Dibeh, 3 Knapp's P. C. C., p. 55.

of unattested documents) by the testimony of some one who is acquainted with the handwriting of the person in question. It seems to be doubtful whether it may be proved by comparing the document with some other document which was written or signed by him;(*i*) but if the latter document is admitted to be genuine, or is already in evidence in the cause, the comparison appears to afford a reasonable and convenient test, if the Judge be familiar with the written character of the language.

No decree for money on bond unless two witnesses or consideration proved.

The Courts are prohibited from "decreeing the payment of any sum due on a tamassook or bond, unless the bond shall be proved to have been executed in the presence of two credible witnesses, or the payment of the sum demanded on the bond, or some other valuable consideration for it having been received, shall be proved to the satisfaction of the Court. But this restriction does not extend to bills of exchange, receipts or notes of hand, in the determination on which the custom of the country is to be abided by."(*j*)

Execution of deed how to be proved.

If a deed, or other attested instrument, be produced, its execution must, in general, be proved by calling the subscribing witnesses, or such of them as are alive. If they be dead or not forthcoming, there is no positive rule in the Civil Courts as to what shall be considered the next best evidence, but there appears to be no objection to receiving the testimony of persons who were present at the execution of the instrument, though not attesting witnesses.(*k*)—The attestation of the instrument ought to be proved to be that of the deceased witness. But if there be several attesting witnesses; so long as any one of them is alive, and capable of being produced in Court without any extraordinary inconvenience, it is not sufficient to prove the signature of another witness who is deceased; for the witnesses have been chosen by the parties

(*i*) S. D. 1847, 7th April, p. 104; Reg. IV., 1793, Sec. 6.

(*j*) Reg. III., 1793, Sec. 15, Benares; Reg. VII., 1795, Sec. 9.

(*k*) S. D. 1848, 19th June, p. 554.

themselves, as the persons on whose testimony they wish to rely; and the surviving witness can state directly whether all that the law requires for the due execution of a deed has been observed or not, whereas the proof of the handwriting of the deceased witness would only afford presumptive and not direct evidence that the legal requisites had been complied with.

If one of the witnesses to the execution of a document be living, he ought to be called to prove the execution, although the Court may have before it copies of the deposition of deceased witnesses, taken in a summary proceeding relating to the same property.(*l*)

Persons unable to write or read may be attesting witnesses to a legal instrument,(*m*) but no great value is attached to their testimony.(*n*)

Execution of deed by females of rank.

Strict proof is required of the execution of a deed by a female of rank, who does not appear before strangers, as fraud may be easily practised in such cases.(*o*)

Effect of unsigned instrument.

A deed of gift not executed by the donor, nor attested by any subscribing witness, was held valid under the Mahomedan law; on the deposition of the cazee, and of the person who drew the deed, that it was drawn in the presence and by the desire of the donor, and was acknowledged by him before the cazee, who thereupon affixed his seal, though not his signature.(*p*)

The draft of an acknowledgment of a debt and agreement to pay it, which was proved to have been drawn up in the presence and by the direction of the debtor, but which was not signed by him, has been admitted as an acknowledgment of the debt.(*q*)

The strongest evidence need not be offered.

The rule which requires the production of the best evidence, excludes only that evidence which of itself indicates the existence

(*l*) S. D. 1848, 6th March, p. 136.

(*m*) S. D. 1847, 31st August, p. 488.

(*n*) See S. D. 1849, p. 78.

(*o*) Sel. Rep. 16th September, 1808, v. 1, p. 257.

(*p*) Sel. Rep. 14th August, 1800, v. 1, p. 52.

(*q*) Eduljee Framjee *v.* Abdoolla Hajee Cherak, 1 Moore's Ind. Cases, p. 461. See S. D. 1847, 10th May, p. 136.

of original sources of information, but it does not forbid a party to submit to the Court weaker, instead of stronger proofs. For instance, if there are several subscribing witnesses to a deed or will, it is only necessary to call one of them; though the others are at hand. Neither is it necessary to call the Magistrate who signed depositions which are offered; it is enough to prove the signature of the Magistrate, and the Court will presume that the examination was conducted in proper form.

Where an action is founded on a certain document, the evidence adduced in support of that document must in the first place be considered, and then the evidence against it.

But it is highly erroneous to reject a document merely because certain other documents connected with the parties but unconnected with the case, have a suspicious appearance.(*r*)

No secondary evidence of contents of producible instruments.

A title by deed must be proved by production of the deed itself, if it is within the power of the party setting up such title; copies may be inaccurate, the recollection of witnesses as to the purport of writings can seldom be relied on, and the whole contents of the instrument may produce a very different impression from that which is produced by the statement of a part of them.

When secondary evidence is admissible.

The contents of documents may be proved by secondary evidence, where the original writing is destroyed or lost, where its production is physically impossible, or at least highly inconvenient, or where the document is in the possession of the adverse party,(*s*) who refuses, after notice, to produce it, or where it is in the hands of a third person, who refuses to produce it and who is not compellable by law to do so, or where the papers are voluminous, and it is only necessary to prove their general results.(*t*)

(*r*) S. D. 1847, 26th June, p. 286.

(*s*) S. D. 1848, 21st February, p. 103; Infra, p. 245.

(*t*) Infra, p. 246.

Where the document has been destroyed or lost.

If the instrument is destroyed or lost, the party seeking to give secondary evidence of its contents must either prove its destruction positively, or at least presumptively, by shewing that it has been thrown aside as useless; or must establish its loss, by proof that a search has been unsuccessfully made where it was most likely to be found, and that he has exhausted all the sources of information which were accessible to him.(*u*)

If the document be important, or if there be reason to suspect that it has been fraudulently withheld, a strict examination is required; in other cases a slighter degree of diligence will suffice, as unimportant papers are more likely to be destroyed or lost than papers of moment. If, in order to prove the destruction, scraps are produced which are alleged to be fragments of the missing instrument, it must be clearly established, and not taken for granted, that such fragments are really parts of that instrument.(*v*)

Execution of original document must be proved.

Before secondary evidence is admitted, it is necessary to shew that the original instrument was duly executed, and was otherwise genuine.

Written evidence of a contract which the parties have put in writing.

A contract which the parties have put in writing, ought in general to be proved by the production of the writing itself. The written instrument may be regarded, in some measure, as the ultimate fact to be proved, especially in the case of negotiable securities; and in all cases of written contracts, the writing is tacitly considered by the parties, as the repository and evidence of their agreement. Whenever the issue depends in any degree upon the terms of a contract, the party whose witnesses shew that it was reduced to writing, must either produce the instrument, duly stamped, or give some good reason for not doing so.

Where unstamped document cannot be supported.

Where a suit is grounded on a document which is under the stamp laws inadmissible as evidence, no decree can be made

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(*u*) Meer Usdoollah *v.* Mussumat Bibee Imaman, 1 Moore's Indian Cases, p. 19.

(*v*) Syud Abbas Ali Khan *v.* Yadeem Ramy Reddy, 3 Moore's Indian Cases, p. 156.

upon merely oral evidence in support of that document.(w) But if the contract, of which the document was the record, can be completely proved(x) by oral testimony independently of that document, the existence of an unnecessary unstamped document does not invalidate a contract which would be valid if there were no writing in existence regarding it: although, of course, the defendant, if he means to rely on a valid contract in writing, as an answer to the plaintiff's demand, must produce it, duly stamped; for all documents which are exhibited as evidence must be stamped.(y)

The contract proved by other evidence.

Case proved without reference to written contract.

And this is probably all that was meant by the Sudder Dewanny Adawlut when it laid down that although a document, written on paper not bearing the prescribed stamp, cannot be admitted or filed, yet if the plaintiff can prove his claim by any other evidence, the Courts are not precluded from receiving such evidence.(z) Thus when a security bond has been declared inadmissible, in consequence of its being written on plain paper, or on paper bearing an improper stamp, the plaintiff may adduce other evidence of the security having been given.(a)

The "other evidence" alluded to in these Constructions, must not be understood to include either copies or any other secondary evidence of the contents of the unstamped document, but must be restricted to evidence which goes directly to prove the transaction of which the parties intended the document to form the record, but of which, in consequence of the omission to stamp it, they possess no available record.

If a written communication be accompanied by a verbal one to the same effect, the latter may be received as independent evidence, though not as a substitute for the writing. Thus, the payment of money may be proved by oral testimony,

Verbal communication.

(w) S. D. 1848, 20th April, p. 349.

(x) S. D. 1847, 6th February, p. 43.

(y) See the next Chapter.

(z) Con. 292, 9th July, 1818; Sel. Rep. 24th August, 1840, v. 6, p. 303; S. D. 1847, 4th February, p. 39. See p 130.

(a) Con. 970, Cal. C. 7th August, West C. 4th September, 1835.

whether a receipt be taken or not,(*b*) and the admission of a debt is provable by oral testimony, though the admission was accompanied with a written promise to pay. So the fact of birth, baptism, marriage, death or burial may be proved by parol testimony, though a memorandum of these events may have been entered in registers, for the entry is no more than a collateral or subsequent memorial of the fact, which may furnish a convenient mode of proof, but cannot exclude other evidence, though its non-production may afford grounds for severely scrutinizing such evidence.

How probate is established.

The title of a person as executor or administrator may be proved, by producing either the probate or letters of administration, or an exemplification or certificate thereof granted by the Supreme Court through its officer.

Oral evidence not to be substituted for disputed document.

Oral evidence cannot be substituted for any writing, the existence or contents of which are disputed, and which is material, either to the issue between the parties, or to the credit of the witnesses, and is not merely the memorandum of some other fact. Thus a witness cannot be asked whether certain notices were published in the newspapers, neither can he be questioned as to the contents of his account-books, but in both these cases the papers and the books, as being the best evidence, must be produced.

A witness, on cross-examination, cannot be asked whether he has made certain statements in writing; but the proper course is to put the document into his hands, and to ask him whether he wrote it.

Where the production of the original cannot be dispensed with.

There are some occasions, in which it is necessary to produce the written instruments themselves. If a bill of exchange, promissory note, or cheque has been originally drawn payable to bearer, or has become so payable in consequence of having been endorsed in blank, it would not be fair to entertain a suit on such instruments when lost, or on the consideration which was given for each, unless the payee who has lost the

(*b*) S. D. 1847, 6th February, p. 43.

instrument tenders sufficient indemnity to the acceptor or maker. As between the endorsee and the acceptor of a bill, the acceptor on payment of the amount has a right to the possession of the instrument, first for his own security, and secondly, as his voucher and discharge in his account with the drawer. If the action be brought by the drawer of a bill against the acceptor, or by any of the parties to a note against the maker, it is necessary that the acceptor or maker should be secured by the possession of the instrument against the demands of a subsequent *bonâ fide* holder.

Where production is impossible.

The contents of writings may be proved by secondary evidence when their production is either impossible or highly inconvenient. Thus inscriptions on walls, surveyors' marks on boundary trees, or notices affixed on boards, may be proved by secondary evidence, and so may a document deposited in a foreign country, if the law or usage of that country will not permit its removal.

Copies of public records.

For the same reason the existence and the contents of any record of a judicial Court, and of entries in any other public books or registers, may be proved by copies duly authenticated.

If it be shewn to the Court that a material instrument is, or that there is reason to suppose that it is in the hands or under the control of a party to the suit, who refuses, after notice, to produce it, or of his agent or servant, it is just that secondary evidence of its contents should be admitted.(c)

Where notice to produce is unnecessary.

It seems reasonable, likewise, that secondary evidence should be admitted even without notice to produce, if from the nature of the action or from the form of the pleadings, the defendant must know that he will be charged with the possession of an instrument and be called upon to produce it; as for instance in an action on account of the detention of a bond or bill of exchange or other writing, or where he has himself stated the loss of a document.

It would appear to be a question as yet undetermined, how far, when any material document is shewn to be in the hands

(c) Supra, p. 241.

of a party to the suit, who refuses to produce it, and when no secondary evidence of its contents is in existence, the Court will interfere to compel the production of the document. But it has been ruled that if there is reason to think that the missing document is not in the possession of the defendant, or that it is vexatiously called for by a plaintiff who has knowingly foregone abundant opportunities for the inspection of it, the Court will leave the plaintiff to sue for it in a separate action.(*d*)

Secondary evidence of results of inspection of many papers.

Secondary proof may be admitted, where the evidence required is the result of voluminous facts or of the inspection of many books and papers, the examination of which could not conveniently take place in Court. Thus, if there be one invariable mode in which bills of exchange have been drawn between particular parties, this may be proved by the testimony of a witness acquainted with their habits of business, without producing the documents, though if the mode of dealing has not been uniform, the writings must be produced. So a witness who has inspected the accounts of the parties, though he may not give evidence of their particular contents, will be allowed to speak to the general balance without producing the accounts. But such general evidence will only be admitted, so far as it rests simply upon the honesty of the witness, and not upon his feelings or judgment. His observation, but not his judgment, may be substituted for those of the Court.(*e*)

Evidence addressed to the senses.

The evidence most satisfactory to the mind is that which is afforded by our own senses.

In many instances, especially where the fact in dispute is sought to be proved by circumstantial evidence, the decision will rest materially on things submitted to the ocular inspection of the Court.

Production of goods.

Where the question turns on the identity or comparison of articles, although a witness be permitted to testify to his

(*d*) S. D. 1849, 7th August, p. 330; Supra, p. 241.

(*e*) See 2 Knapp's Rep. p. 273.

having made the comparison without first proving that the articles cannot be produced, yet their non-production, when unexplained, may naturally give rise to a suspicion of unfairness.(*f*)

Presumption against the party not producing.

In causes either relating to disputed rights of way, or involving some question which depends upon the relative position of places, it is often desirable that the Court should have an opportunity of viewing the spot to which the controversy relates, since maps and papers frequently are inaccurate and obscure, and may perhaps have been prepared with an express view to mislead.

Inspection of locality by the Court.

The Native Judges not unfrequently view the spot: but they in many cases and the Zillah Judges in most cases, procure the requisite information by deputing an ameen to view it.(*g*)

As evidence afforded by our own senses is seldom attainable in judicial trials, the Courts are satisfied with requiring the testimony of those who can speak from their own personal knowledge, either of the main fact in controversy, or of other facts from which the truth as to the main fact may be inferred.

Hearsay.

The witness should be permitted to state those facts only, which lie within his own knowledge, whether they be things said or things done. Where he gives his testimony upon information derived by him from others, he virtually ceases to be himself a witness: we can only learn from him what some one else has said as to the fact in dispute: and the person whose words are thus quoted becomes the real witness; and a witness whose testimony is of little value, as it is not given under the sanction of an oath or declaration, and is not liable to be tested by cross-examination; so that the Court has no opportunity of judging what were his powers of perception, his opportunities of observation, his attentiveness in observing, the strength of his recollection, or his disposition to speak the truth. The original speech having been made without oath or

Effect of admitting hearsay.

(*f*) Supra, p. 231.

(*g*) See below, Chap. XXIII.

affirmation, an oath or affirmation that there was such a speech, gives it no further solemnity or sanction. This sort of secondhand evidence is called hearsay, and cannot, except in a few special cases, be received in judicial investigations.

Legal meaning of hearsay.

The term "hearsay" is used with reference to what is done or written, as well as to what is spoken; and in its legal sense, it denotes that kind of evidence which does not derive its value solely from the credit given to the witness who appears in Court, but which rests also, in part, on the veracity and competence of some other person.

Where writing or words of third person are not hearsay.

It may happen, however, that the very fact in controversy is, whether certain things were written or spoken, and not whether they were true; or the oral or written statements tendered in evidence may prove to be the natural or inseparable concomitants of the principal fact in controversy.

In either of these cases, the writings or words are not regarded as hearsay, but are original and independent facts in proof of the issue. Thus if the question be whether a party has acted prudently, wisely or in good faith, the information upon which he acted, whether true or false, is original and material evidence. This may be the case in actions for malicious prosecution or libel, and also in suits against agents or trustees for alleged breach of duty.

Where question whether agent acted prudently.

Where the question is what bodily or mental feelings existed.

Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of those feelings made at the time in question, such as the representation by a patient of the nature and effects of his disease, are also original evidence.

Where the declarations offered in evidence are part of the transaction under inquiry.

There are other declarations and acts which are admitted as original evidence, being distinguished from hearsay by their connexion with the principal fact under investigation, and by their tendency to explain the intention and character of facts which are in their own nature ambiguous.

Declaration made at the time of the transaction in question.

Thus where a person enters upon land in order to assert any right, or changes his actual residence, or domicile, or goes upon a journey, or leaves his home, or returns thither, or

remains abroad, or secretes himself, or does any other act which it is material to understand, his declarations made at the time of the transaction, expressive of its character, are regarded as verbal acts, indicating a present purpose and intention, and are therefore admitted in proof.

But such declarations, though admissible as evidence of the declarant's knowledge or belief of the facts to which they relate, and of his intentions respecting them, are no proof of the facts themselves, and therefore, if it be necessary to shew the existence of such facts, independent proof of them must be given.

The circumstances and declarations offered in proof, must be so connected with the main fact under consideration, as to illustrate its character, to further its object, or to form, in conjunction with it, one continuous transaction.

Declarations of co-trespassers how far admissible.

If several persons are jointly sued for a trespass committed by them, the declarations of each, so far as they are part of the transaction which constitutes the ground of suit, are admissible against all; but those declarations which amount to mere admissions or narratives of past events, can only be received against the party making them.(*h*)

Acts and declarations of co-partners.

The act or declaration of each member of a partnership, in furtherance of the common object of the association, is the act or declaration of all: for each is in fact the agent of the others for all purposes within the scope of the partnership.

How far declarations of agent are evidence against principal.

An agent may, within the scope of his authority, bind his principal by his agreement;(*i*) and in many cases by his acts, and by the words with which those acts were accompanied, so far as the words tend to determine the quality and intention of the acts. What the agent has said, may in fact constitute the agreement of his principal, or the statements of the agent may be the inducement to the third party to accede to the agreement. Evidence must therefore be admitted to prove what statements the agent has made.

(*h*) Supra, p. 225.

(*i*) Sel. Rep. 27th April, 1848, v. 7, p. 488.

A party is bound by his own admission; but he is not precluded from questioning or contradicting any thing which another person has asserted respecting his conduct or his agreement, merely because that person has been an agent of his. As the declarations of the agent are admitted only because of his legal identity with the principal, they bind the principal only so far as the agent has authority, express or implied, to make them.(*j*).

Statement of third person in presence of a party.

A statement made by a third person is evidence against the plaintiff or defendant, if he was present when the statement was made; for it then becomes material to consider, whether by his language or demeanour on the occasion it appeared to receive his assent.

Hearsay in matters of public interest.

In questions relating to matters of public and general interest, the general opinion or reputation which exists on the subject is admissible as evidence, since it is natural to suppose that persons converse together and inform themselves about public rights which they may themselves have occasion to exercise.

On what subjects.

Such evidence appears to be admissible where the question relates to rights of common, to local customs, to the boundaries of zillahs or public divisions of the country, to a claim of dues on a ferry, or to the question whether a piece of land on a river is a public landing place or not, or whether a certain road is a public road or not, or to a prescriptive liability to repair bridges or embankments.

Not to establish private titles.

But evidence of reputation is not admissible to establish titles or rights having no connection with the exercise of any public duty, or with any subject of general interest; because men in general have no special inducement to discuss or to acquaint themselves with private rights.

Hearsay admitted in matters of pedigree.

In questions respecting inheritance or descent, facts must often be inquired into, which occurred many years before the trial and which were known but to few persons. It may be

(*j*) Rajunder Narain Rae *v.* Bijai Govind Sing, 2 Moore's Indian Cases, p. 253.

impossible to prove by living witnesses, the relationships of past generations.

In matters of pedigree, therefore, traditional evidence is allowed as being often the sole species of proof which can be obtained; and the declarations of persons who were related by blood or marriage to the family in question, may be given in evidence; for where family transactions are talked of among relatives, what passes in conversation upon such subjects is likely to be true.

Even general reputation in the family, proved by the testimony of a surviving member of it, may be considered as falling within the rule.

But before a declaration is admitted in evidence, there ought to be reasonable proof, from other sources than the statement of the declarant himself, that he was related to the family, and entitled to make the declaration; for otherwise a stranger, by claiming alliance with a family and making statements regarding it, might affect the interests of its members after his decease.

If the declarant be himself alive, and capable of being examined, his declarations are inadmissible.

In such questions, not only are the oral declarations of deceased relatives admissible, but family conduct, such as the tacit recognition of relationship, and the disposition and enjoyment of property, will also be regarded as evidence from which the opinion or belief of the family may be inferred.

Thus if the alleged father is proved to have brought up the party as his legitimate son, this amounts to a daily assertion that the son is legitimate;(*k*) so the concealment of the birth of a child from the husband of its mother, the subsequent treatment of such child by a person who at the time of its conception was living in adultery with the mother, the fact that the child was never recognized as the legitimate offspring of the husband; all these circumstances go far to rebut the pre-

(*k*) Khajah Hidayut Oollah *v.* Rai Jan Khanum, 3 Moore's Indian Cases, p. 295.

sumption of legitimacy which exists in all systems of law, in favour of the issue of a married woman.

Entries made by a parent or relative in any book or any document or paper stating the fact and date of the birth, marriage or death of a child or other relative, are received as the written declarations of the deceased persons who respectively made them. So the correspondence of deceased members of the family will on proof of the handwriting be received, as well as recitals or descriptions in wills, or family deeds, or deeds which are proved to have been executed by some member of the family to which the statement refers.

Declaration after the controversy has begun.

Declarations, to be admissible as evidence of reputation, must have been made not only before any suit was instituted, but before any controversy arose, regarding the matter to which they relate; for, when a contest has begun, people are apt to take part on one side or the other, and their statements are less to be relied upon. But they are not to be rejected, in consequence of their having been made with the direct view of preventing disputes.

Declarations against interest.

Declarations made by persons, since deceased, against their own interest, if such interest be of a pecuniary or proprietary nature, are receivable in evidence; because men are seldom found to make any untrue admission against themselves. This evidence ought not to be received if the declarant be alive, (even although it may be out of the power of the litigant party to produce him,) nor unless the declarant be shewn to have had a competent knowledge of the facts to which the declaration related.

The books of stewards, or other receivers, though strangers to the suit, are admitted in evidence after their death, so far as the entries therein tend to charge them with the receipt of money.

The Court will admit every entry which, at the time when it was made, completely charged the maker to any extent, great or small, whether such entry was made at the time of the fact declared, or on a subsequent day; and it will not merely read

an admission against interest, as for instance, the statement of a sum paid to the writer, but will look to the whole contents of the entry, to see what the demand was, which is thereby admitted to be discharged; but it will not read independent matters which are unconnected with such entries. The entry must have been made by a person against whose interest the entry is, or by his authorized agents, or he must be shewn to have adopted it as his own.

Where one man sues another for the money due on a bond or note, and the defendant pleads that the period of limitation has elapsed, the plaintiff may rebut this plea by shewing that a payment has been made to him within 12 years in respect of the money due on the instrument.

If, in order to prove this fact, he tenders in evidence a receipt written by himself upon the back of the instrument; this endorsement, as it to some extent discharges the debtor, appears at first sight to fall within the rule which admits, as evidence, entries against the interest of the party making them, and also within the general rule, that instruments are, in the absence of evidence to the contrary, presumed to have been written at the time they bear date.

It is, however, almost impossible for the defendant to prove that the endorsement was not written on the day of the date, because the instrument continues in the hands of the creditor or his representatives, and although it may seem at first sight against the interest of the creditor to admit a past payment, yet he may thereby in many cases set up the instrument for the residue of the sum secured; and therefore such endorsements ought to be proved to have been upon the instrument at or recently after the times when they bear date.

Entries made in ordinary course of business.

If there be no reason to suspect sinister motives, entries made in the ordinary course of business or professional employment are presumed to be correct, because such entries usually relate to facts which are known but to few persons, and because they are made for the purpose of preserving a

true record of the transactions to which they relate, and are generally subject to the inspection of those by whom any inaccuracy would be detected.

Where a declaration by word of mouth or in writing is made in the course of the business of the individual making it, it may be received in evidence, though it is not against his interest.

But proof must be given that it was made contemporaneously with the fact which it narrates, by a person whose duty it was to make it, and to make the whole of it, who was personally acquainted with the fact, who had no interest in stating an untruth, and who is since dead.

Thus the books of the messenger of a bank are admissible to prove the dishonor of a bill of exchange by the acceptor, upon proof that the entries were made in the ordinary course of business, and by the party who has himself done the business.

Such entries are no proof of collateral facts.

Though an entry made in the course of office, respecting facts necessary to the performance of a duty, is proof of those facts, yet the statement of other circumstances, not necessary to the performance of the duty, is no proof of these circumstances.

Government accounts must be proved.

The accounts and papers of a salt agent's office, or of any Government officer, must, like those of a private individual, be proved before they are received in evidence.(*l*)

Weight due to official documents.

Official documents are not always evidence in support of the facts they state: they must be examined critically, like other documents. Thus a report of a Darogah to a Magistrate, founded on hearsay, does not prove the truth of the facts therein stated by the Darogah. It only proves that the Darogah made such statements.(*m*)

An entry in the quinquennial register of a Collectorate, which entry has been compared and certified as exact by the

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(*l*) Sel. Rep. 24th May, 1844, v. 7, p. 170.

(*m*) S. D. 1847, 7th August, p. 402.

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Zillah Judge, is not of itself sufficient to prove that a village entered in the register in 1795, as a neej talook, actually was a neej talook.(*n*)

How far plaintiff's books are evidence for him.

The books of account of a banking or mercantile firm, when proved to be genuine and accurate by the testimony of the persons who wrote them, or of the accountant of the firm, may be received in evidence of a debt claimed by the firm,(*o*) and the fact that they are not signed or attested is no obstacle to their reception: as it is not usual to have them signed or attested.(*p*)

Account-books need not be signed or attested.

But although such evidence is admissible, the weight due to it in each particular case must be determined by the Court. When books are fairly and honestly kept, entries in them are entitled to credit, but evidence of this nature may easily be fabricated: and a money claim on account, where the defendant denies any sum to be due, cannot be enforced merely on production of entries on the plaintiff's account-books, unsupported by oral or other testimony.(*q*)

Evidence necessary to establish claim for rent.

In a suit to recover rent from an occupier of land, it is not necessary for the plaintiff to produce any farming engagement or cabooleut between himself and the defendant, if, by the accounts, it appears that the arrears are due.(*r*)

If the jumma wasil bakee papers of the village are on the record, and are proved in the cause, they are of themselves good and sufficient ground to establish a balance.

Ancient deed proves itself.

A deed, having nothing suspicious about it, and bearing so old a date that it may reasonably be supposed that the attesting witnesses are dead, may safely be presumed to be genuine without express proof, especially if there be evidence that the

(*n*) S. D. 1849, 18th April, p. 113. See Calcutta Review, v. 12, p. 450.

(*o*) Baboo Ulruck Sing *v.* Benypersaud, 2 Knapp's Rep. p. 265; Sel. Rep. 1st December, 1824, v. 3, p. 417; Ibid. v. 5, p. 154; S. D. 1847, 21st September, p. 563; S. D. 1848, 16th February, p. 83; 27th April, p. 374; S. D. 1849, 27th March, p. 77; 21st May, p. 159.

(*p*) S. D. 1848, 6th January, p. 5.

(*q*) Soorabjee Vacha Ganda *v.* Koonwurjee Manickjee, 1 Moore's Indian Cases, p. 47.

(*r*) S. D. 1847, 7th August, p. 403; Con. 380; Con. 574.

Documents should come out of the proper custody.

property to which it relates was enjoyed according to the tenor of the deed, and if it come out of the custody of a person in whose hands one might reasonably expect to find it, though that may not be actually the best and most proper custody.

In deciding whether an instrument is genuine or not, the Courts will readily allow for any apparent error; or any inconsistency, in dates or otherwise, which could only have arisen from inadvertence.(*s*)

In considering genuineness Court looks at conduct of party.

In judging of questions of this class, the Courts will review the conduct of the person who relies upon the instrument, the genuineness of which is in question, and will attach weight to the fact that his conduct has been inconsistent with the rights which the deed purports to confer upon him, as for instance if he has submitted to adverse adjudications, which the production of the deed, if genuine, would have prevented.(*t*)

Where a man sued for possession of land, alleging that it had been sold to him, at first conditionally, to secure the payment of a loan; and afterwards unconditionally, upon a further advance to the defendant; although no instrument importing an unconditional sale was produced, the Court considered such sale to be established by the fact, that the ikrarnamah, or deed of defeasance, executed by the plaintiff at the time of the conditional sale, had been returned to him by the defendant.(*u*)

Documentary evidence not noticed in pleadings and thereby discredited.

Important documentary evidence, if it exist, ought to be mentioned in the pleadings, in order that the attention of the opposite party may be called to it, and that he may be prepared to meet it, and to shew (if the fact be so) that it is not genuine. Where the plaintiff sued for money due on bond, and the defendant, in proof of payment in full, produced certain accounts purporting to bear the signature of the plaintiff, who

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(*s*) Sel. Rep. 14th July, 1835, v. 6, p. 32.

(*t*) Sel. Rep. 1st August, 1808, v. 1, p. 245; Ibid. 22nd December, 1823, v. 3, p. 275; S. D. 1847, 5th July, p. 315; Ibid, 9th March, p. 67; 27th April, p. 113.

(*u*) Sel. Rep. 19th September, 1844, v. 7, p. 181.

denied that the signature was his; the Sudder Dewanny Adawlut was of opinion that the absence of any mention of these accounts in the defendant's answer, threw much suspicion upon their genuineness.(*v*)

It is almost unnecessary to state that registration confers no validity upon a document which is not genuine.(*w*)

How far statement in deed proves payment.

The statement(*x*) in a written instrument, that a certain sum of money has been paid by A. to B. an executing party, is *primâ facie* evidence that the money was paid at the time of the execution of the deed; and, if it be supported by other more direct evidence, or by a series of acts on the part of B. inconsistent with the non-payment of the money, A. will not be put to further proof of payment. But as such statements are usually inserted in documents, in expectation that the money will be paid when the documents come to be executed, they do not afford conclusive evidence of the payment, and their effect may be rebutted by other evidence, tending to shew that the money was not paid when the deed was executed.

A witness is not bound to answer any question that tends to expose him to criminal punishment or penal liability, as for instance a question whether he has received or administered a bribe.(*y*)

But he cannot refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to expose him to a penalty or forfeiture, merely because the answering of such question may tend to establish that he owes a debt, or is otherwise open to a civil suit.

Evidence excluded on grounds of public policy.

The Courts, upon grounds of public policy, abstain from pressing for information in certain quarters where important information is likely to exist.

Husband and wife.

Thus a wife cannot be a witness for or against her husband.

(*v*) S. D. 1847, 8th February, p. 45.

(*w*) S. D. 1849, 20th April, p. 123.

(*x*) Chowdry Debypersaud *v.* Chowdry Dowlut Sing, 3 Moore's Indian Cases, p. 347; Sel. Rep. 19th January, 1844, v. 7, p. 152.

(*y*) Con. 757, 28th February, 1833.

Legal adviser.

Where a Barrister, Attorney or Vakeel is professionally employed by a client, he cannot be compelled to disclose any communications which pass between them in the course of that employment,(z) whether the communication relate to litigation already commenced, or to that which is only anticipated; for otherwise no one would dare to consult a professional adviser with a view to his defence or to the enforcement of his rights. An interpreter or an intermediate agent between the client and the adviser is under the same obligation as the legal adviser himself. The protection does not cease with the litigation, nor is it affected by the party's ceasing to employ the adviser and retaining another, nor by the Vakeel being struck off the list of practitioners, nor by the death of the client. The privilege is that of the client, not of the adviser; and the former can alone waive the benefit of it.

The legal adviser must disclose questions which were put to him by his client as to matters of fact only, though not those which were put with the view of obtaining legal advice. He may be called to prove his client's handwriting, or to prove the execution, by his client, of a document which he has himself attested.

Judges, arbitrators, and counsel are not compelled to testify to matters in which they have been judicially or professionally engaged.

Where agent may be witness against his principal.

There is no legal bar to the managing agent of one of the parties, to a civil suit, (not being a mookhtar employed in the Courts, but an agent for the management of the property of his principal) being summoned and examined as a witness on the motion of the opposite party.(a)

Secrets of state.

Secrets of state, or things, the communication of which would be prejudicial to the public interest, are likewise protected from disclosure.

(z) R. S. C. 16th September, 1846, p. 86.

(a) R. S. C. 22nd September, 1836, p. 12.

The official transactions between the heads of the Departments of Government, and their subordinate officers, are in general treated as secrets of state.

When official communications are not privileged.

And where the production of papers is on this ground forbidden to be enforced, secondary evidence of their contents is for the same reason excluded. But communications, though made to official persons, are not privileged, where they are not made in the discharge of any public duty.

But the law recognizes no other privilege in this matter; and compels medical or spiritual advisers to divulge the secrets (if relevant to the issue) with which they have become professionally acquainted, and will not allow even a servant or a private friend to withhold a relevant fact, though communicated to him in the strictest confidence.

Effect of evidence.

These rules relate to the admissibility of evidence in different cases. As to its effect upon the mind of the Judge, it has been observed that evidence may be either positive, amounting to a direct proof of the very fact in question; or circumstantial, implying a proof of circumstances from which the existence of that fact may be presumed. And the strength of circumstantial or presumptive evidence varies according to the nature of the facts proved, and their relation to each other.(*b*)

Evidence of single witness.

The evidence of a single witness, supported by circumstantial evidence, or by what may be called the probabilities of the case, is sufficient to establish any fact, however important.(*c*)

Weight due to positive and to negative testimony.

In estimating the value of evidence, the testimony of a person who swears positively, that a certain conversation took place, is of more weight than that of one equally credible, who says that it did not; because the evidence of the latter may be explained by supposing that his attention was not drawn to the conversation at the time; whereas the statement of the former must be true, if it be not a pure invention.(*d*)

(*b*) Supra, p. 235.

(*c*) Sel. Rep. 7th April, 1831, v. 5, p. 107.

(*d*) See 3 Moore's Indian Cases, p. 357.

Test of conflicting testimony.

It has been justly remarked, that where there are some facts which are established beyond all possibility of doubt, there is no better criterion of the truth, no safer rule for investigating cases of conflicting evidence, where perjury and fraud must exist on the one side or the other, than to consider what facts are beyond dispute, and to examine which of the two cases best accords with those facts, according to the ordinary course of affairs, and the usual habits of human life. But merely to take an arbitrary mean between the two extremes, according to the conflicting statements of the parties and their witnesses, is not to decide, but to abandon the duty of decision.(*e*)

Scientific and professional subjects.

Upon subjects of science and of professional skill, the opinions of persons versed in the particular science or profession are received as evidence.

And so where the question turns on local usage.

Where A., a gomashtah, drew a hoondee or bill of exchange on B., his principal, which was cashed by C. on the security of D. given by D.'s simple endorsement on the hoondee; the Court of first instance exonerated D. from liability, because the surety was not executed on a separate piece of paper bearing the requisite stamp; but the Sudder Court remitted the case, in order that evidence might be taken as to what was customary among mahajuns, in the matter of becoming surety by a simple endorsement on a hoondee.(*f*)

Foreign law.

In conformity with this general rule, the existence and meaning of the laws, as well written as unwritten, and of the usages and customs of foreign states, may be proved by the testimony of professional or official persons of practical experience in the particular branch of law, or the particular custom, which is under discussion; *e. g.* a merchant may be examined, when the question relates to the law and usage as to bills of exchange.

(*e*) See 1 Moore's Indian Cases, p. 44; S. D. 1849, 23rd May, p. 160.

(*f*) S. D. 1849, 13th December, p. 456. See Ibid, p. 415.

Reference for opinion of Advocate General.

In cases turning on English law, or upon the law and practice of the Supreme Court, the subordinate Courts ought(*g*) to apply to the Sudder Court, which will, if necessary, consult the Advocate General, either in cases pending before it on appeal, or upon application from the inferior Courts.

The Courts consult their Law Officers when doubtful points of Hindoo or Mahomedan law arise: and, if necessary, they refer for information to Pundits of peculiar sects.(*h*)

The priests of the Armenian and Greek churches in India are referred to for expositions of the Armenian and the Greek law.(*i*)

The law of this country, as current among Mahomedans and Hindoos, is a matter upon which evidence is not to be received, as upon foreign law, but all questions upon it are to be determined by the Court: and when questions are submitted to the Law Officers the object is not to examine them as witnesses, but to consult them (as assessors,) upon matters of which they are supposed to be fully cognizant.(*j*)

Effect of previous judgment as evidence of facts.

It has been already shewn how, and in what sense, a previous decision prevents the institution of a new suit.(*k*) The doctrines which govern this subject would appear to be equally applicable when it becomes necessary to consider the operation of a judgment already pronounced, such judgment being adduced as evidence of particular fact in a suit.

The judgment of a Court of concurrent jurisdiction directly upon the point, is, as evidence, conclusive between the same parties upon the same matter directly in question in another

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(*g*) Cir. Ord. 21st April, 1843.

(*h*) Reg. V., 1831, Sec. 6, Cl. 2; Sel. Rep. v. 5, pp. 108, 163, 276, 296, 304, 335. See S. D. 1848, 4th May, p. 410.

(*i*) S. D. 1848, 3rd August, p. 735; 17th August, p. 771; Supra, p. 14; Sel. Rep. 17th August, 1848, v. 7, p. 528. See Beglar *v.* Dishkoon, 20th January, 1842, 1 Sevestre's Rep. p. 159, from which it seems doubtful whether there be any Armenian law at all.

(*j*) Sumboochunder Chowdry *v.* Naraini Dibeh, 3 Knapp's P. C. C., p. 55.

(*k*) Supra, Chapter VIII.

Court. But it is not evidence of any matter which came collaterally in question, nor of any matter incidentally cognizable, nor of any matter which can only be inferred by argument from the judgment.(*l*)

It is a rule applicable to the evidence of verdicts and judgments, that they are, in general, not evidence for or against one who was a stranger to the judicial proceeding in which they were obtained: inasmuch as he had no opportunity of calling witnesses, or of cross-examining those on the other side, or of appealing against the judgment. It has been stated as a reason for not allowing judgments as evidence for a stranger, even against a party who was engaged in the former suit, that if the stranger had been a party to that suit instead of the person who succeeded in it, the result might have been different; for the parties being different, the evidence might have varied; part of the evidence might then have appeared inadmissible or doubtful, or perhaps other evidence might have been produced by the party who was unsuccessful.

Foreign judgments.

The exact weight due to foreign judgments, whether as evidence, or as a bar to the institution of a suit, may perhaps be considered as scarcely settled;(*m*) but the better opinion seems to be, that foreign judgments must, in order to be received, finally determine the points in dispute, and must be adjudications upon the actual merits, and they are open to be impeached upon the ground, either of fraud or collusion, or of want of jurisdiction, whether over the cause, over the subject matter, or over the parties.

How they may be impeached.

To avoid a foreign judgment on the ground of want of jurisdiction, it is necessary to shew, that the defendant was not a subject of the foreign state, or resident, or even present in it at the time when the proceedings were instituted; and therefore that he could not be bound, by reason of allegiance or domicile, or temporary presence, by the decision of its Courts; and fur-

(*l*) Sel. Rep. 30th September, 1847, v. 7, pp. 399, 412; S. D. 1850, 6th March, p. 39; 19th March, p. 58.

(*m*) See Sel. Rep. v. 7, p. 372.

ther that the defendant was not the owner of real property in such state, for otherwise, since his property would be under the protection of its laws, he might be considered as virtually present, though really absent.

By the Mahomedan law, the death of a missing person may be judicially presumed when ninety years from his birth have elapsed, even though he may have been last seen within five or ten years.(*n*)

(*n*) Sel. Rep. 15th April, 1831, v. 5, p. 108.

CHAPTER XXII.

WITNESSES AND EXHIBITS.

Where one party refers to oath of other, no evidence offered.

IF the plaintiff consents to refer the facts in dispute to the oath of the defendant, the deposition of the defendant is conclusive, and so if the defendant consents to refer the facts to the oath of the plaintiff, or if both refer them to the oath of some third person. Both parties must agree.(*o*)

Parties must file their evidence.

But if this be not done, each party must submit to the Court the evidence, oral and documentary, upon which he relies in support of his case; and in order that every sort of evidence may be duly examined and tested by the party adverse to him who produces it, and also that the grounds upon which the Court has proceeded may at all times be intelligible, the Judge requires the parties to file their own evidence, whatever that evidence may be. They are bound under a heavy penalty to obey his order;(*p*) and the Judge is not at liberty to decide a cause upon the mere perusal of evidence (such as the records of previous cases) indicated to him by a party litigant, but not regularly filed in the particular cause.(*q*)

All evidence should be preserved in the cause.

The Court itself, indeed, has power to refer to a record, should the circumstances of the case shew such a reference to be expedient. But when reference is made to a record, the Court causes copies of the necessary papers and evidence to be recorded with the case under investigation.(*r*)

(*o*) Reg. XXVIII., 1814, Sec 28; S. D. 1848, 26th February, p. 117; 17th June, p. 539. Supra, p. 195.

(*p*) Reg. XXVI., 1814, Sec. 12, Cl. 3; R. S. C. 7th September, 1841, p. 17.

(*q*) Sel. Rep. 22nd August, 1843, p. 130.

(*r*) S. D. 1847, 9th June, p. 203; S. D. 1848, 22nd April, p. 352; 29th August, p. 791.

The Zillah Courts are authorized, whenever they may have occasion to refer to a Collector's register, to require from the Collector the production of the original register, or an attested copy of such part thereof as may contain the required information.(*s*)

How the Courts refer to the Collector's registers.

Where a document is relied upon as evidence, it must be filed, and the opposite party must have the opportunity of examining it and of offering any objections they may think fit to urge; and it is highly irregular to act upon the mere copy of a document, where the original has been once exhibited to the Court, but has been taken away.(*t*)

Document not to be taken away after inspection.

When a suit has been referred to a Collector for his report,(*u*) the Court, on receiving the report, together with the documents therein referred to, proceeds to try the case, after calling for such further evidence as may be necessary.

But the Court is not at liberty to receive any sunnud or other documentary evidence of any kind, which has not been produced before the Collector, and for not producing which the party does not assign a sufficient cause.(*v*)

Restriction upon reception of evidence where cause tried after report of Collector.

In all cases to which this exception does not apply;—

Upon the day previously fixed, each party gives in to the Court, a petition or application, naming the persons who can give evidence on his behalf, and requesting the Court to issue a summons for their attendance. No person is allowed to produce his witnesses without making an application of this nature to the Court, and no witnesses can be summoned or examined, unless such an application has been filed.(*w*)

Application for summons.

If a party, after receiving due notice from the Court, fails to furnish his evidence within the period prescribed by law, or to assign any reason for his default, the evidence cannot be received by that Court or by the Court

Consequences of default.

(*s*) Reg. VIII., 1800, Sec. 15.

(*t*) Sel. Rep. 5th July, 1847, v. 7, p. 351.

(*u*) Supra, pp. 134, 135.

(*v*) Reg. II., 1819, Sec. 30, Cl. 6.

(*w*) Reg. X., 1829, Sch. B. Art. 11; Con. 182, 17th August, 1814.

of Appeal, but if he assigns reasons, their validity must be inquired into.(x)

Application must be stamped.

Every petition or application for summoning a witness must be written on stamped paper of the value of one rupee, in the Zillah Court and in that of the Principal Sudder Ameen; and of eight annas value in that of the Sudder Ameen,(y) but in pauper cases, and in all cases in the Moonsiff's Court, such applications require no stamp.(z)

If an application contains the name of more than one witness, it is on stamped paper of as high a value as if the application for each witness had been written on a separate stamp.(a)

Issue of summons

In order to procure the attendance of witnesses, the Courts, upon the requisition of the plaintiff or defendant, or of their respective Vakeels, issue a summons to the witnesses whom the parties may name (provided they be not Hindoo or Mahomedan women of a rank or quality which would render it improper to compel them to appear in a Court of Justice,) specifying the parties at whose request the summons may have been issued, and the names and residence of the witnesses, and requiring them to appear in the Court on a day named in the summons, and there to depose concerning the matter in dispute between the parties.(b)

The subpœna (as it is called,) runs in the following form:

In the Court of

Ramdhun of plaintiff,

v. Sheik Edoo of defendant.

To of in

Whereas your attendance is required to give evidence on behalf of the plaintiff [or of the defendant] in the above cause,

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(x) S. D. 1848, 3rd January, p. 1; 18th March, p. 213; See S. D., 1847, 27th April, p. 111; 26th May, p. 171. But see S. D. 1847, 18th January, p. 17, a case from a Moonsiff's Court.

(y) Reg. XXVI., 1814, Sec. 22; Con. 145, 19th March, 1814; Reg. X. 1829, Schd. B. Art. 11; Con. 1088, Cal. C. 21st April, West. C. 12th May, 1837.

(z) Reg. V., 1831, Sec. 9, Cl. 2.

(a) See Ibid.

(b) Reg. IV., 1793, Sec. 6, Benares; Reg. VIII., 1795, Sec. 2, Ced. and Conq. Prov.; Reg. III., 1803, Sec. 7; Reg. XXIII., 1814, Sec. 29, Cl. 2; Act XVII., 1845.

you are hereby required personally to appear before the Court on the day of 18 , for this purpose.

Given under my hand and the seal of this Court, this day of 18 .

A. B., *Judge.*

or Principal Sudder Ameen, or Sudder Ameen, or Moonsiff.

A party to the suit is not in general a competent witness either for or against his co-defendants.(*c*)

If a party, while the suit is pending, takes the benefit of the Act for the relief of Insolvent Debtors in Calcutta, he may give evidence in the cause.(*d*)

A defendant cannot be a witness.

Although the complainant may, if he pleases, bind his rights by the oath of the defendant, yet unless this be expressly done, one of several defendants cannot be examined as a witness. If a man be made a defendant solely with the view of withdrawing his testimony from the suit, the proper course is to nonsuit the plaintiff,(*e*) but it is wholly irregular, upon a mere suggestion that persons have been made defendants for an improper purpose, to discharge them without the consent of the plaintiff, from being defendants, and to examine them as witnesses for the defence.(*f*)

Rule where defendant has been made witness in order to exclude his testimony.

A party to an action cannot be called upon to point out the witnesses named by the opposite side.(*g*)

How the summons must be served.

Witnesses may of course attend upon the requisition of the parties, without the service of any summons, but if they do not, the summons must be personally and actually served upon the witness, in the same manner as the notice to appear and answer is served upon a defendant,(*h*) in such a way as to make him acquainted with its purport: but the serving officer

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(*c*) Sel. Rep. 2nd December, 1843, v. 7, p. 141; Con. 1126, 26th January, 1838.

(*d*) Sel. Rep. 5th March, 1833, v. 5, p. 271; Con. 1126.

(*e*) S. D. 1847, 11th August, p. 422.

(*f*) Gourchunder Podar *v.* Chunder Kullah, 8th February, 1844, S. D. 1847, August 11th, p. 422; S. D. 1847, 7th August, p. 406.

(*g*) R. S. C. 22nd September, 1845, p. 71.

(*h*) Supra, p. 150.

has no right to touch or to apprehend him: and the shewing of a summons to a witness, while he was passing by upon an elephant, has been held to be a personal and actual service.(*i*)

It seems to be usual for the serving officer to obtain from the witness a written acknowledgment of the receipt of the summons, containing an engagement to attend in pursuance of the summons.(*j*)

Of summoning witnesses engaged in salt manufacture.

Witnesses who are employed in the salt and opium manufacture are summoned during the manufacturing season in the same manner as if they were parties in the cause; but such persons are not summoned except when their attendance is absolutely necessary; and on their appearance, they are examined and dismissed with all practicable despatch.(*k*)

The Court may in special cases order the attendance of persons employed in the salt manufacture, whether parties or witnesses, even during the manufacturing season, and may cause the ordinary process to be executed upon them for that purpose, but in such cases the Judge records(*l*) his reasons for deviating from the usual rules relating to such persons; and in the notice, summons or warrant, he states that it has been specially ordered to be so executed in virtue of the discretionary power vested in him.(*m*)

This provision is also applicable to persons employed in the chokey department.(*n*)

Paupers who are unable to pay the expense of summoning witnesses, are entitled to have them summoned gratis by one of the paid chuprassies attached to the Court of the Zillah Judge,(*o*) but in point of fact it is very difficult to obtain the assistance of those officers.

(*i*) R. S. C. 3rd November, 1846, p. 87; Reg. XXIII., 1814; Reg. VII., 1832, Sec. 5, Cl. 1; Supra Chap. XVI.

(*j*) Con. 172, 27th July, 1814.

(*k*) Supra p. 154.

(*l*) Reg. X., 1819, Sec. 21, Cl. 8; Reg. XXIII., 1814, Sec. 30.

(*m*) Ibid. Cl. 9.

(*n*) Ibid, Sec. 28.

(*o*) S. D. 1849, 6th November, p. 423; Supra p. 151.

A foreign potentate cannot be called to give evidence in the Company's Courts;(p) although, if he should think fit to give evidence of his own accord, there can be no reason for rejecting his testimony.

Foreign potentate not to be summoned.

In the case of a native subject of high rank, a commission ought to be issued under Act VII., 1841, (mentioned below) to a Moonsiff, to proceed to his residence, and there to take this evidence. This was ruled in a case where the Rajah of Bettiah(q) was to be examined: the Courts decide for themselves in each particular case, as to the pretensions of those who claim exemption from appearing in Court.

Native of rank how examined.

Witnesses summoned to attend the Courts of justice are exempted from the ferry toll established by Regulation XIX., 1816.(r)

Witness exempt from ferry toll.

In a suit, in which the witnesses named by the plaintiff have been duly summoned, and have neglected to attend under the summons and to give their evidence as required, the Judge calls upon the plaintiff's Counsel to satisfy him by evidence that these witnesses are material to the cause.(s)

Cause struck off the file for non-attendance of witnesses.

The materiality of the evidence of the recusant witness must be proved by oath or solemn declaration; the oath or declaration of the party at whose instance he has been summoned is not by itself, sufficient proof; and the proof may be complete without the oath or declaration of such party. The oath or declaration of his agent has been deemed sufficient.(t)

If the Judge be satisfied on this head, he resorts to process for compelling the attendance of the witnesses: if the plaintiff's Counsel fail to satisfy him, but not otherwise, it is his duty to pronounce an order of dismissal on default. But he does not pass such an order until he has explicitly called

Process to compel attendance.

(p) R. S. C. 26th February, 1844, p. 57.

(q) Ibid.

(r) Cir. Ord. 31st July, 1817.

(s) Reg. IV., 1793, Sec. 6; Con. 1126, 26th January, 1838.

(t) Reg. IV., 1793, Sec. 6; S. D. 1849, 7th November, p. 427.

upon the plaintiff's Counsel to proceed in the manner above indicated.(*u*)

But when a party has duly given in a list of witnesses whom he requires to be summoned, the cause must not be decided without hearing their testimony, unless it proves absolutely impossible to procure their attendance.(*v*)

If compulsory process is found necessary, the Judge issues an order to the Nazir to seize and bring the witness before the Court. The witness is liable to a fine not exceeding five hundred rupees, and to be committed to close custody until he shall consent to give his evidence and sign his deposition.(*w*)

A plea of the disgrace, which in the imagination of some attaches to a personal attendance in Court, is no excuse for the non-attendance of a person (not being a woman of rank) who has been summoned to give evidence.(*x*)

Consequence of non-attendance of witness.

Where a warrant has been issued for the apprehension of a witness who has failed to attend in pursuance of a summons, and the witness has evaded service of the warrant, it is proper to issue a proclamation requiring his attendance within a certain period; and if he still neglects to attend within the time limited in the proclamation, the Court imposes such fine upon him as it may judge proper, not exceeding five hundred rupees, and proceeds to levy the same by attachment and sale of his property.(*y*)

There must have been actual service.

When the summons has not been personally served on a witness, he cannot be proceeded against either by fine, or by the issue of a warrant for his seizure:(*z*) even although it may

(*u*) R. S. C. 11th August, 1840, p. 47.

(*v*) S. D. 1850, 20th April, p. 136; See 3rd April, p. 90.

(*w*) Reg. IV., 1793, Sec. 6, Benares; Reg. VIII., 1795, Sec. 2, Ced. and Conq. Prov.; Reg. III., 1803, Sec. 7; Con. 159, 19th May, 1814; Con. 1126, 26th January, 1838; Rep. Sum. Ca. 11th August, 1840, p. 47; Act XVII., 1845, Sec. 3; S. D. 1849, April 26th, p. 128.

(*x*) R. S. C. 2nd May, 1842, p. 30.

(*y*) Con. 487, 12th September, 1828; Con. 172, 27th July, 1814.

(*z*) Con. 172, 27th July, 1814; Con. 465, 7th December, 1827; Sel. Rep. 7th December, 1837, vol. 4, p. 287.

have been established beyond all doubt that the summons was carried by the serving officer to his residence, and that all proper means were used to serve it upon him.(*a*)

Witness attending and refusing to give evidence.

A witness who attends in pursuance of a summons, but who refuses to bear testimony, or to subscribe his deposition as by law is required, is in the first instance, committed to custody; and is called upon a second time, after such interval as may by the Court be judged sufficient, (not being less than one entire day) when if he persist in his refusal to give evidence, he is subjected to a fine proportioned to his situation in life, and not exceeding five hundred rupees, and is confined in the jail of the Civil Court.(*b*)

No limit is fixed for the confinement which the Court may award in commutation of fines adjudged in such cases. The Court exercises its discretion according to the circumstances of each case. A witness fined for refusing to swear, or to make affirmation, is discharged on paying the fine, if the suit in which his evidence was required has been decided; or he is kept in confinement, whether he have paid the fine or not, if the suit be still pending, until he consent to give his evidence on oath or affirmation as required. The Court may remit the fine and release the witness if he submits and gives his testimony.(*c*)

In order to bring these provisions into operation, it is not necessary to offer to the Court any proof that the testimony of the recusant witness is material.(*d*)

Penalty for refusing to produce mahajun's books.

Whenever it may be necessary to call upon a witness to produce a mahajun's books, or any documents of the like nature which are known, or presumed on strong and sufficient grounds to be in his possession; if the witness refuse or neglect to produce the documents required from him, and fail to assign satisfactory cause for not producing them, he is lia-

(*a*) Con. 487, 12th September, 1828.

(*b*) Reg. IV., 1793, Sec. 6, Benares; Reg. VIII., 1795, Sec. 2, Ced. and Conq. Prov.; Reg. III, 1803, Sec. 7.

(*c*) Con. 110, 3rd September, 1812.

(*d*) Con. 159, 19th May, 1814.

ble to be proceeded against in conformity with the spirit of the rules for compelling witnesses to give their testimony, viz., by imposing a fine not exceeding five hundred rupees, and detaining him in custody until he shall consent to produce the documents required.(*e*)

How expenses of witness are defrayed.

If a witness who attends pursuant to a summons, has incurred expense in consequence of his being required to appear, the Court awards him a reasonable sum for his charges, whether he be examined or not. If this sum be not paid immediately, or secured to the satisfaction of the Court, the party summoning the witness loses the benefit of his testimony, and the Court, after decree, confines such party until he shall discharge the sum awarded to the witness.(*f*)

The Moonsiff's power is limited to the imposition of a discretionary fine upon any witness who, having been duly summoned, shall appear before him but shall refuse to give evidence or to subscribe his deposition. He is strictly prohibited from confining or otherwise punishing witnesses, and is enjoined to take their depositions with all due expedition, so as not to detain them unnecessarily from their home, a species of oppression which is often practised.(*g*)

Form of affirmation by witnesses.

Persons of the Hindoo or Mahomedan persuasion within the territorities of the East India Company, when called upon to bear evidence in the Civil Courts, make affirmation to the following effect:—"I solemnly affirm, in the presence of Almighty God, that what I shall state shall be the truth, the whole truth, and nothing but the truth."

The penalties enacted against perjury and subornation of perjury apply to persons affirming falsely or procuring others to affirm falsely under this Act.(*h*)

(*e*) Con. 270, 26th March, 1817; See pp. 241, 245, Supra.

(*f*) Reg. IV., 1793, Sec. 6, Benares; Reg. VIII., 1795, Sec. 2, Ced. and Conq. Prov.; Reg. III, 1803, Sec. 7, Infra Chap. XXVIII.

(*g*) Reg. XXIII., 1814, Sec. 31, Cl. 3; Sec. 33; Reg. L., 1803, Sec. 2, Cl. 2.

(*h*) Act V., 1840; Cir. Ord. 3rd April, 1840, containing the forms of affirmation.

It is not required that the deponent should sign his name to any written affirmation, but he should read it aloud in Court, or the declaration should be read out to him and repeated by him before giving his deposition, and at the heading of his written deposition it should be stated that he was sworn, or rather that he was caused to affirm, according to the provisions of Act V., 1840.(*i*)

How to be made.

A statement made without oath, and without the usual declaration in lieu of an oath, cannot be received in evidence.(*j*)

Statements not on oath or declaration not evidence.

All witnesses, of whatever religion or country, who have the use of their reason, are to be received and examined as witnesses.

No person is disqualified to be a witness by reason of a conviction of any offence whatever.(*k*)

Conviction does not disqualify.

The fact of a witness being afflicted with leprosy does not bar the admission of his evidence.(*l*)

Persons not deemed competent witnesses are those who appear not to have sufficient discretion, as an idiot or a very young child; those who appear not to have a right sense of the obligation to speak truth, those who are parties to the suit, those who stand in the relation of husband or wife to either party, and in some cases the legal advisers of the parties.(*m*)

Who are incompetent witnesses.

The deposition of every witness who may appear in Court, ought to be taken *vivâ voce* in open Court, and (if he be a Native) in the Persian, Bengali, or Hindoostanee language, and reduced into writing in the Bengali, Persian or Nagree character, according as the witness may desire. The deposition is subscribed by the witness with his name or mark.(*n*)

Depositions how taken.

(*i*) Cir. Ord. 3rd April, 1840, para. 3.
(*j*) S. D. 1848, 21st February, p. 100.
(*k*) Act XIX., 1837.
(*l*) Con. 726, 26th October, 1832.
(*m*) Supra, pp. 257, 258.
(*n*) Reg. IV., 1793, Sec. 6, Benares; Reg. VIII., 1795, Sec. 2, Ced. and Conq. Prov.; Reg. III., 1803, Sec. 7; Supra, pp. 110, 150, 271.

A deposition taken on oath or affirmation in the private dwelling of a Sudder Ameen or other Judicial Officer, is illegal, and cannot be received as evidence.(o)

The deposition of an European witness must be recorded in English, and a translation made in the vernacular language of the Court, and annexed thereto.(p)

How the examination is conducted.

The witness is first examined by the party calling him, then cross-examined by the opposite party; then, if need be, he is re-examined by those who produced him.

Questions not to be leading.

In the examination of a witness the parties and their Vakeels must be carefully prevented from instructing or intimidating the witnesses; the questions put must be relative to the matters in issue and not to the personal character of the parties,(q) unless those be matters in issue; they must not be such questions as in themselves suggest the answer which is required to them, but such as will induce the witness himself to state in his own language that which he knows: they ought to relate to that which the witness himself knows, and not to what he has merely heard.

How witness may refresh his memory..

The witness may be allowed to refresh his memory by a reference to any memorandum or entry made by himself at a time when the transaction was fresh in his recollection, or which he has habitually inspected, in the course of private business or of public duty.

Cross-examination.

After a witness has been examined by the party who called him, he may be cross-examined by the other side. The object of cross-examination may not only be to obtain new facts not before elicited, as, to shew that his means of knowledge were imperfect, or that he has some interest in the event of the cause; but also to impeach the character of the witness for veracity.

(o) Con. 627, 28th February, 1831.

(p) Con. 1035, Cal. and West. C. 12th August, 1836.

(q) Reg. XXIII., 1814, Sec. 36.

He may therefore be asked if he has not given a contrary account of the same matter on a former occasion, and if he denies this, proof may then be given, from other sources, that he has done so. Evidence may also be offered to prove that he has been convicted of perjury or the like, or generally that he is of such a character as not to deserve to be believed upon his oath. But no evidence can be given against him of particular acts of misconduct, for this would be to engraft another trial upon that which is already before the Court, and would not only perplex the administration of justice, but put the witness himself to the disadvantage of being assailed on charges of which he had no previous notice.

Re-examination.

If a witness be cross-examined, the party who called him has a right to re-examine him with respect to any statements made by him in his cross-examination, in order that he may explain them where it is necessary and practicable. But he cannot at this stage be examined on perfectly new matter.

Advantage of the Judge's presence.

It is obvious that the presence of the Judge, during the examination, is a matter of high importance; for besides the respect with which his presence will naturally inspire the witness, he ought to be able by use and experience to keep the evidence from wandering from the points in issue, and he has an opportunity of observing the quality, age, education, understanding, behaviour, and inclinations of the witnesses, upon whose evidence he is to decide; in which points there is far less power of discrimination when their depositions are reduced to writing, and read to the Judge in the absence of those who made them.

And it is, apparently, in full confidence that the system of oral examination, laid down in the regulations as the most desirable, is actually pursued, that the Judges of the highest Court of Appeal invariably adopt, except in cases of the most suspicious kind, the conclusions at which the Courts of this

country have arrived, so far as regards the credit due to the different witnesses who have given evidence in the cause.(r)

Depositions taken before officers of Court.

For all these reasons, the Judges ought, if possible, personally to examine the witnesses whose depositions are required to be taken in their respective Courts; but as it seems that the extensive functions of those Officers seldom admit of their doing so, they are authorized, in cases of necessity, to employ their assistants, or any of their Native Officers, in taking down the depositions of witnesses, whom they may not have time to examine *vivâ voce* themselves. The depositions must, however, be taken in open Court in the presence of the parties, or their authorized pleaders, whose attestation is to be subscribed to all depositions so taken, in testimony of their having been present; and if any question or dispute arises in taking the deposition of a witness so examined, the Judge, as soon as may be practicable, enquires into and disposes of the question.(s)

Instructions given to Officer.

In all these cases the assistant or Native Officer, employed to examine the witnesses, should be clearly informed, by a roobukaree, recorded in pursuance of Section 10, Regulation XXVI., 1814,(t) of the point or points, upon which the examination is to be taken, with instructions not to allow the parties or their Vakeels to question the witnesses upon other points. The grounds of necessity which may prevent the Judge from personally examining the witnesses, and compel him to employ an assistant or Native Officer to examine them, should in every instance be recorded on the proceedings which contain the order for examination.

The Judge seldom present.

I have most reluctantly come to the conclusion that it is rarely the case that a Judge, even of the lowest rank, examines witnesses in person, or is present (in the sense of being attentively or intelligently present) at their examination,

(r) Knapp. P. C. C. v. 1, p. 269; v. 2. pp. 259, 263, 272, 283.

(s) Reg. XXIV., 1814, Sec. 11, Cl. 1.

(t) Supra, p. 208.

although it is usually conducted in the same room in which he is administering justice.

When a deposition is taken before a Native Officer, he affixes his signature in token of that fact.(*u*)

How the depositions are written out.

The deposition of every witness ought to commence by specifying the name, the father's name, or if the deponent be a married woman, the name of her husband, the religion, caste, profession, age, and place of residence of the deponent.(*v*)

In order to prevent tampering with the depositions after they have been completed, they are continuously written in a certain manner.(*w*)

The interrogatories put to the witnesses are stated in their order; first, those put by the party at whose summons they attend; next, those put by the opposite party; last, those questions, (if any,) which may have been put by the Judge. All the questions are numbered in a regular series, and if by accident or other cause it becomes necessary to make a fair transcript of the deposition, the original rough draft, similarly attested, is to be invariably placed on the file.

Summons to witness in different jurisdiction.

If a Moonsiff requires the evidence of a person not within his local jurisdiction, he issues the necessary process for procuring the attendance of such person, and sends it to the Moonsiff within whose local jurisdiction such person is: it is the duty of the Moonsiff last named to endorse such process and cause it to be duly served and executed:(*x*) and so of the other Judicial Officers.

Where female of rank is witness.

If it is necessary to obtain the testimony of a Hindoo or Mahomedan woman of a rank or quality, which would render it improper to compel her to appear in a Court of Justice; the Courts are to commission three creditable women, (who are sworn to execute the commission truly and faithfully) to administer the prescribed declaration to the witness, and to ex-

(*u*) Cir. Ord. 25th October, 1822, para. 4.

(*v*) Reg. XXIII., 1814, Sec. 37.

(*w*) Cir. Ord. 18th May, 1846.

(*x*) Act XVII., 1845, Sec. 2; Supra p. 154.

amine her on written interrogatories to be delivered to them by both parties or their Vakeels, if both parties desire to examine the witness.(y)

Examination of absent witnesses.

The Court, upon the application of the parties, may order the examination, upon interrogatories or otherwise, before an Officer of its own, or any other person or persons named in the order, of any witnesses within its jurisdiction, or may order a commission to issue to any subordinate Court for the examination of such witnesses. It may order a commission to issue to any other Court for the examination of witnesses at any place or places, out of its own jurisdiction; and it may give all proper directions for taking such examinations. The Judge of the Court to whom the commission is directed, ought to take the examination in open Court, in all cases where witnesses are able to attend and are not (either absolutely, or at the discretion of the Court) legally exempted from attendance. A commission, for the examination of witnesses beyond the jurisdiction of the Court issuing it, may, under special circumstances, be directed to private individuals.(z)

Where an order is made for the examination of witnesses who are within the jurisdiction, the Court may by an order command the attendance of any person to be named in such order, and may direct his attendance to be at his own place of residence, or elsewhere, as it may think convenient; and may order him to produce all necessary documents and papers. Wilful disobedience to any such order is deemed a contempt of Court, and is punishable as in other cases of refusing or neglecting to give testimony. Persons whose attendance is required in this manner are entitled to payment for expenses and loss of time, in the same manner as upon attendance in Court.(a)

(y) Reg. IV., 1793, Sec. 6, Benares; Reg. VIII., 1795, Sec. 2, Ced. and Conq. Prov.; Reg. III., 1803, Sec. 7; Act V., 1840, Reg. XXIII., 1814, Sec. 29, Cl. 1.

(z) Act VII., 1841.

(a) Ibid, Sec. 3; See pp. 241, 245, 272, Supra.

Every Court or person thus authorized to take the examination of witnesses, is required to take all such examinations upon oath, or upon affirmation in cases wherein affirmation is admissible or required upon a trial, and the giving or procuring others to give false evidence, subjects the offending parties to the penalties of perjury or of subornation of perjury.(*b*)

Before any order or commission for the examination of a witness is issued, the Court issuing it must be satisfied that there is good reason for believing that the witness will be unable to attend at the usual time for examination, by reason of absence from the jurisdiction, sickness, or other cause allowed by law.(*c*) And it must make inquiry as to the present residence of the witness, and as to the Court of equal or inferior rank to its own which may be nearest to his residence. The commission is ordinarily directed to such equal or inferior Court as may most conveniently execute it. If there be doubt as to which is the most convenient Court of equal or inferior degree, the commission may be directed to the Judge having jurisdiction within the district in which the commission is to be executed: and that Officer may at his discretion execute the commission in his own Court, or direct it to any subordinate Court within his district. No deposition, thus taken by commission, can be read in evidence, without the consent of the party against whom it may be offered, unless it be proved that the deponent is beyond the jurisdiction of the Court, or dead, or unable, from sickness or infirmity, to attend to be personally examined, or distant, without collusion, more than a hundred miles from the place where the Court is held, or exempted by law, absolutely or at the discretion of the Court, from personal appearance in Court; or unless the Court shall at its discretion dispense with the proof of any of the above circumstances, or shall authorize the deposition of any witness being read in

Use to be made of depositions of absent witnesses.

(*b*) Act VII., 1841, Sec. 4.

(*c*) Supra, p. 269.

evidence, notwithstanding proof that the causes for taking such deposition have ceased at time of reading the same; and after the witness has been produced and has delivered his testimony, it is lawful for the Court, at its discretion, to authorize the reading of the deposition. All depositions thus taken, being duly certified, may be read at the discretion of the Court, without proof of the signature to such certificate.(*d*)

Commissions to Court of Small Causes.

Such commissions as are to be executed within the local limits of the jurisdiction of Her Majesty's Court ought not to be directed to that Court, but to individual Commissioners or to the Calcutta Court of Small Causes.(*e*)

Commissions to territories of allied states.

Such commissions and orders may be issued for execution within the territories of Princes and States in alliance with the East India Company, and all persons within such territories, being in the service of the East India Company, are required to pay obedience thereto, and for disobedience shall, on being found within the jurisdiction of the Court, or Judge, issuing any such commission or order, be punishable in like manner as if the offence had been committed within such jurisdiction; and for giving false testimony under the same, they are punishable by any Court of Justice within the territories of the East India Company.(*f*)

The Court to which any commission shall be directed, may punish the wilful disobedience of it, as a contempt of its own authority; notwithstanding it shall not itself have made the order; the punishment is the same as in other cases of refusing or neglecting to give testimony.(*g*)

The Sudder Dewanny Adawlut has promulgated appropriate forms of commissions for the use of the Civil Courts when the examination of absent witnesses is to be taken under Act VII., 1841; of these one specimen is subjoined:(*h*)

(*d*) Act VII., 1841, Sec. 5.
(*e*) Ibid, Sec. 6.
(*f*) Ibid, Sec. 7.
(*g*) Ibid, Sec. 8; Supra, pp. 270, 271, 272.
(*h*) Cir. Ord. 11th February, 1842; See Civil Guide, p. 300.

Form No. 1 is intended to be addressed to Ministerial Officers of the Court, or other persons who may be residing within the jurisdiction of the Court.

Form of commission to the Ministerial Officers of the Court or to persons residing within its jurisdiction.

FORM No. 1.

In the Court of Dewanny Adawlut for the Zillah of

Ramnarain Sing, plaintiff, *versus* Ramjeiwun Doss, defendant.

To A. B.

Whereas, by an order dated the in the above cause, it has been directed that the evidence of C. D. and E. F. residing at , be taken by commission under the provisions of Act VII., 1841; and, whereas, in pursuance of such order, you are appointed to take the evidence of the said witnesses; You are hereby empowered and required to take the examinations and depositions of the said witnesses upon oath or affirmation, as provided in Section 4 of the said Act, upon the interrogatories hereunto annexed, (or, "on the points indicated in the annexed extracts from the Court's proceedings," as the case may be) which duty you shall perform truly, faithfully, and without partiality to any or either of the parties in this cause; examining the witnesses in the presence of the parties or their agents (if in attendance) who shall be at liberty to question them on points specified, and returning this warrant of commission, together with the interrogatories hereunto annexed, and examinations of the said witnesses thereon, to this Court on or before the day of next.

Given under my hand and the seal of this Court, this day of 18

(L. S.) A. B.

The Act permits examinations to be taken upon questions orally put to the witnesses, as well as upon written interrogatories, but interrogatories should, where practicable, accompany the commission.(*i*)

Rules for facilitating the examination of witnesses in Calcutta.

The party on whose behalf a commission is issued to the Court of Small Causes for taking the depositions of witnesses,

Party suing out the commission must

(*i*) Cir. Ord. 11th February, 1842: See Civil Guide, para. 6.

point out witnesses, and pay the fees.

is to appear in that Court personally or by a duly constituted mooktar, to point out the witnesses and to pay the usual fees of that Court for subpœnas: and if he fail to do this within a reasonable period, the Court of Small Causes will, at their discretion, return the whole of the documents to the Court from which they proceeded.(*j*)

Sudder Adawlut may direct a Lower Court to issue commission.

The Sudder Dewanny Adawlut, on cause being shewn, will direct a Lower Court to issue a commission to take the evidence of absent witnesses.(*k*)

Exhibits admitted on stamped application.

An exhibit can only be received by the Court upon the petition or application of the party who desires to tender it in evidence; such application must be written on paper of the same value as is required in the case of an application for the examination of a witness; with the like exemptions.(*l*) If it relates to more than one exhibit, it must be written on stamped paper of as high a value as if the application in respect of each exhibit had been written on a separate stamp. Witnesses and exhibits may be comprised in the same application, upon the conditions prescribed by Sections 15 and 16, Regulation I. 1814 as to the value of the stamps.(*m*)

No document receivable unless stamped.

The law has directed that deeds, instruments, and writings shall be charged with stamp duties according to a prescribed scale; and that they shall not be pleaded, given in, admitted in evidence, or otherwise received or filed in any Court whatever, unless the paper on which they are written be duly stamped.(*n*)

But a document which was executed while no stamp was required by law, is admissible without a stamp; and a document which bears the stamp which was required by law at the time of its execution is considered as duly stamped, although the stamp be lower than would, under the existing law, be required for a similar document.(*o*)

(*j*) Cir. Ord. 8th July, 1842.

(*k*) R. S. C. 7th November, 1842, p. 40.

(*l*) Supra, p. 266.

(*m*) Reg. XXVI., 1814, Sec. 22.

(*n*) Reg. X., 1829; Supra, pp. 242, 243.

(*o*) S. D. 1850, January 3rd, p. 2.

Exception as to account-books.

The circumstance that account-books are written on unstamped paper, constitutes no objection to their admission as evidence.(p)

Deeds contained in account-books.

But where guarantees, bonds, tumusooks, or other obligations for the payment of money, are entered in account-books, they cannot be received, as such, as evidence in a civil suit, unless the paper upon which they are respectively engrossed, bear the stamp appropriate to such instrument.(q)

Documents relating to Mofussil property must be stamped.

A deed of gift drawn on unstamped paper in Calcutta for the conveyance of immovable property in the Mofussil, the donor being at the time a resident of Calcutta, and the donee a resident of the Mofussil, is not admissible as evidence in the Civil Courts.(r)

Exemption under Insolvent Act.

Under the late and the present Acts for the Relief of Insolvent Debtors in Calcutta, documents executed on plain paper pursuant to Sec. 79 of the former Act, and Sec. 75 of the latter, are admissible as evidence.(s)

Where time is given to stamp unstamped document.

In the Courts of the North-Western Provinces, where a plaintiff presents a document requiring a stamp, but written on plain paper, either as the ground of his claim, or in support of it; that is to say, a document without which he cannot prove his case; the general rule is to nonsuit him. It is, however, discretionary(t) with the Court to give him a reasonable time to apply to the revenue authorities for the purpose of having it stamped. If a defendant presents such a document, on which his defence is founded or by which it is supported, a similar indulgence may be granted if the ends of justice appear to require it. Plaintiffs ought only to receive this permission in very special cases indeed.(u) Whenever

(p) Con. 275, 2nd July, 1817; Con. 5[illegible], 6th May, 1831; Supra, pp. 254, 255.

(q) Con. 325, 18th August, 1820; Con. 970, Cal. C. 7th August, West. C. 4th September, 1835; Cir. Ord. West. C. 3rd, Cal. C. 31st August, 1838.

(r) Con. 312, 1st April, 1820.

(s) Sel. Rep. 15th September, 1842, p. 118; Sec. 9, Geo. IV. Chap. 73; Sec. 11. Vic. Chap. 21.

(t) Cir. Ord. 7th January, 1842.

(u) S. D. 1848, 5th August, p. 744.

the indulgence is granted, the reasons for according it should be distinctly stated in a separate proceeding.(*v*) And where a party presents a document bearing an insufficient stamp, the Court is empowered to give him time, and unless there be special reasons to the contrary, it does give time to apply to the revenue authorities for the purpose of having the proper stamp affixed.(*w*)

Court may allow time for stamping document inadequately stamped.

This discretionary power was exercised until lately by the Civil Courts throughout the Presidency of Fort William; but so far as regards the Lower Provinces it has been taken away by a Circular Order of the Court of Sudder Dewanny Adawlut of Calcutta, dated 27th September, 1850 (*x*)

Where document unstamped.

Where it is objected by a party, that two documents which ought to be written on separate stamps, are upon the same paper, the Judge should give the holder of the document time to have it duly stamped, and should not decide upon it in its imperfect state.(*y*)

A Moonsiff is not to give official copies of any proceedings, depositions or exhibits on plain paper for the purpose of being used elsewhere as evidence: nor are such documents capable of being filed as evidence. Copies of final orders in miscellaneous cases, as well as of all interlocutory orders may be granted on plain paper to the parties litigant.(*a*)

Documents which partake of a twofold character, namely, that of letters, and of engagements for the payment of money, such as in some parts of the country pass between the buyers and sellers, and are looked upon by the parties themselves rather as correspondence, than as legal obligations for the payment of money, are admissible in evidence without a stamp.(*b*)

(*v*) Cir. Ord. 7th January, 1842; S. D. 1848, 2nd May, p. 392.

(*w*) Cir. Ord. 7th January, 1842, para 2.

(*x*) See S. D. 1850, 2nd May, p. 169, 17th September, Rajinder Chatterjee *v.* Taramonee Debya, p. 487.

(*y*) S. D. 1848, 22nd February, p. 106; Cir. Ord. 216, of 27th October, 1837; Con. 1147; S. D. 1848, 20th April, p. 349.

(*a*) Cir. Ord. 9th March, 1848.

(*b*) S. D. 1847, 2nd October, p. 597.

A deed is admissible as evidence in a Court of Justice, upon which the proper stamp has been affixed under the orders of any Commissioner of Revenue, on the representation of any Collector subordinate to his authority.(c)

Admission of a deed in evidence which has been stamped by order of any Commissioner of Revenue.

It is not the province of the Civil Courts to decide upon the powers of the Revenue Officers in respect to each other: and if a deed, when presented to a Court, bears the proper stamp, it should be received in evidence, without raising any question as to the competency of the authority by whose orders such stamp was affixed.(d)

The Civil Courts cannot decide on the powers of the Revenue authorities in respect to each other.

The law invests the Revenue local authorities, and the Board of Customs, Salt and Opium, with the power of determining what documents require a stamp, and what stamp they require; and a deed declared by such authority to be exempt from stamp duty, must be received by the Courts.(e)

A deed declared by the Revenue authorities exempt from stamp duty, must be received by the Courts.

The Collector's receipt for the amount of the penalty is not sufficient to legalize a document; it must be submitted to the superintendent to be actually stamped.(f)

The document must be actually stamped.

Where a Moonsiff entertains doubts whether a document presented to him as an exhibit has been duly executed on paper bearing the prescribed stamp, it is his duty to transmit the document, with a statement of the case, to the Judge for his opinion, and to be guided in his decision of the reply which he may receive.(g)

Every piece of written(h) evidence (excepting exhibits proved by absent witnesses) ought to be produced in Court at the trial, and, if disputed, ought to be duly proved by the examination of witnesses, whose depositions are reduced into writing and signed. Every exhibit is marked with some letter or number to identify it, and the letter or number is referred to in the deposition proving it. The Moonsiffs are ordered also to date, sign or seal each exhibit. All exhibits proved by witnesses not pre-

How exhibits are proved.

(c) S. D. 1847, 2nd October, para. 5.
(d) Ibid, para. 6.
(e) Con. 1331, Cal. C. 1st, West. C. 15th April, 1842.
(f) Con. 6, 3rd April, 1805.
(g) Reg. XXIII., 1814, Sec. 38, Cl. 1.
(h) Reg. XXIII., 1814, Sec. 38, Cl. 3; Supra, pp. 238, 242, 264, 265.

sent in Court, are in the same manner marked and referred to in the depositions proving them, and are endorsed and minuted, as having been read at the time they may have been read in the Court.(*i*)

The state of exhibits when filed is to be noted.

In order to prevent any alteration being made in documents which have been filed in Court as exhibits, the Record-keeper or some other Officer of the Court is required to certify, in the presence of the Vakeels of the parties, or of the parties themselves, the actual state of such document at the time of filing, and to note all interpolations, erasures, or other alterations at that date apparent on the face of them.(*j*)

Causes of rejection endorsed on exhibit.

If any exhibit or written evidence is offered to a Court in a cause depending before it, and the Judge of the Court shall think proper to refuse to file it, as not being relevant, or not produced in proper time, or for other good and sufficient cause he endorses upon it the word "rejected," together with the names of the parties in the cause, and the name of the party who produced the document, the date and reasons of rejection, (which may be written either upon the document rejected, or on a paper annexed to it) and he subscribes his name to the endorsement, and returns the document with his reasons so written to the person who produced it.(*k*) But he is not to return documents which have been filed, but which have been proved or suspected upon the trial to be forgeries.(*l*)

Reasons for rejecting testimony ought to be recorded.

When a Judge rejects evidence, he ought to record in detail his reasons for so doing, and it is not enough for him to state in general terms that false witnesses are easily procurable in that part of the country.(*m*)

(*i*) Reg. IV., 1793, Sec. 6, Benares; Reg. VIII, 1795, Sec. 2, Ced. and Conq. Prov.; Reg. III., 1803, Sec. 7.

(*j*) Cir. Ord. 178, Cal. and West. C. 29th July, 1836; Cir. Ord. 8th October, 1841; See S. D. 1848, 8th January, p. 9; S. D. 1849, May 7th, p. 137.

(*k*) Reg. IV., 1793, Sec. 6, Benares; Reg. VIII., 1795, Sec. 2, Ced. and Conq. Prov.; Reg. III., 1803, Sec. 7; Con. 139, 16th December, 1813.

(*l*) Con. 869, 14th February, 1834.

(*m*) Sel. Rep. 26th June, 1847, v. 7, p. 349; Infra, Chap. 27.

Course to be pursued where record of case has been destroyed.

Where the record of a case has been destroyed, the Judge ought to call upon the parties to file such evidence as they may possess or may be able to procure, and also to state whether they wish the witnesses whose depositions have been already taken, to be re-examined; and he must do every thing in his power to supply what has been destroyed.(*n*)

(*n*) Sel. Rep. 19th August, 1847, v. 7, p. 386.

CHAPTER XXIII.

PARTICULAR INVESTIGATIONS.

SECTION I.

BY REFERENCE TO THE HIGHER UNCOVENANTED JUDGES OR TO THE COLLECTOR.

Matters of account, fact and usage referred to the Sudder Ameen for investigation.

IN the trial of regular suits by the Zillah Judges, or in miscellaneous cases, whenever the adjustment of accounts regarding the execution of decrees, and mercantile or revenue transactions, or the investigation of disputes between landlord and tenant, or other special matters of account, fact or usage, may be requisite, and such adjustment or investigation, if conducted by the Judge himself, would occupy a larger proportion of his time than could be conveniently devoted to it; the Judge is authorised to direct any of the Sudder Ameens or Principal Sudder Ameens under his jurisdiction, to make such adjustment or investigation.(*o*)

Instructions to the Sudder Ameen.

The Judge in these cases furnishes to the Officer thus deputed, such part of the proceedings and such detailed instructions, as may appear necessary for his information and guidance; and directs the parties or their Vakeels, or authorized agents to attend upon him during the adjustment for investigation.

The instructions specify, whether the Officer is merely to transmit the proceedings which he may hold on the inquiry, or is also to report his own opinion upon the point referred for his investigation.

(*o*) Reg. XXIII., 1814, Sec. 76, Cl. 1; Con. 761, West. C. 22nd February, Cal. C. 15th March, 1833; Con. 815, West. C. 23rd August, Cal. C. 1st November, 1833.

The proceedings of the Sudder Ameen or Principal Sudder Ameen are received in evidence in the case, unless the Judge may have reason to be dissatisfied with them, in which case he makes such further inquiry as may be requisite, and passes such ultimate judgment or order, as may appear to him to be right and proper.

Proceedings of the Sudder Ameen received as evidence.

Whenever occasion may require the examination and scrutiny of native account-books, in any civil case, and where it is deemed inexpedient to call in the aid of assessors for that purpose,(p) recourse is had to the agency of officers called Ameens, who are appointed at the expense of the plaintiff or defendant, as the case may be, and whose duty it is to inspect the books either at the house of the person whose books are to be examined, or in Court, as may seem fitting, with reference to the circumstances of the case and the wishes of the parties. The latter course is followed by the subordinate Courts, which are not authorized to employ assessors for the purpose stated.(q)

If any necessary expense be incurred in making the inquiries or adjustments referred to, the Judge, on the completion of the enquiry or adjustment, may order payment of the amount of such necessary expense by one or both of the parties in the case.(r)

Expense of inquiries.

The subordinate Judges, however, are not entitled to any allowance for travelling expenses, or upon any other account, in cases in which, without being deputed by a superior Court, they may, for their own satisfaction, or at the request of the parties, deem it proper to visit and inspect the property in dispute, or to make enquiries in regard to it on the spot.

Where Native Judges entitled to travelling expense.

The Judges must not order or allow a report of any matters of fact relating to any cause depending before them, with a view to the passing a decree, to be made to them by any Officer of the Court, or any other person excepting

Matters of fact not referred with a view to decree.

(p) See the next Chap.

(q) Cir. Ord. 4th February, 1840; Sel. Rep. 17th July, 1844, p. 177.

(r) Reg. XIII., 1824, Sec. 5.

in cases in which special authority for that purpose may be given to the Courts by any regulation, or where a reference may be made to the Officers on any point concerning Hindoo or Mahomedan Law.(s) It is therefore irregular to call upon the treasurer of the Judge's establishment for reports regarding the trustworthiness of account-books in the native languages as affecting the validity of claims which may be grounded.(t)

Rent or revenue accounts referred to Collectors for report.

In causes concerning rent or revenue, or other matters formerly cognizable in the Courts of Maal Adawlut,(u) between proprietors of land, or farmers of land holding their farms immediately of Government, and their respective dependant talookdars, under-farmers, or ryots; or between dependant talookdars and their under-farmers or ryots; or between under-farmers farming lands of proprietors of land, or of farmers of land, who farm their lands immediately of Government, or of dependant talookdars, and their dependant talookdars, under-farmers or ryots; or between other persons concerned in the collection or payment of land rents, or revenues, either as principals or sureties;—the Judge is empowered to refer to the Collector for his report, any accounts, the adjustment of which may be necessary towards the decision of the suit. The reference is made to the Collector, by a precept under the signature of the Judge and seal of the Court, in which are specified the accounts referred and the papers which the Judge may think it necessary to send in elucidation of them, and the time within which the precept is to be returned, duly executed, or a good and sufficient cause to be shewn for the delay. The Judge may likewise command the parties or their Vakeels, and any witnesses they may have to produce, to appear before the Collector to be examined regarding the accounts; and he may empower the Collector to administer the customary oaths

(s) Reg. IV., 1793, Sec. 16, Benares; Reg. VIII., 1795, Sec. 2, Ced. and Conq. Prov.; Reg. III., 1803, Sec. 17.

(t) Cir. Ord. 4th February, 1840.

(u) S. D. 1849, 10th May, p. 146.

to the witnesses, or to examine the parties on oath, if they shall agree to be so examined. The Collector must submit his report on the accounts to the Court by the prescribed time, attested by his official seal and signature, or must assign his reasons for delaying it. The Judge upon the receipt of the Collector's report may either confirm, set aside, or alter his adjustment of the accounts, or may pass such decision respecting them as may appear to him proper.

Where there is no reference to Collector.

But the Judge has no authority to refer to the Collector any accounts relating to suits in which he, or any of his public Officers, or private servants, or the Government, may be a party.(*v*)

SECTION II.

SPECIAL INQUIRIES BY AMEENS.

Ameens employed in investigation of local rights and usages.

In questions which may arise in suits depending before the Judge of any Zillah Court relating to adjustment of accounts in revenue or mercantile transactions, or regarding the boundaries of lands or houses, or regarding the right of way in roads or pathways, or regarding any rights in forests, commons, rivers, lakes, ponds, wells, reservoirs or watercourses, or regarding the quantity or description of land and the rent to which it is liable; and generally in all questions of local rights and usages(*w*) which cannot be ascertained by reference to the Collector's records and cannot be conveniently decided without enquiry on the spot, the Zillah Judge may empower an Ameen (to be selected as mentioned below,) to make a local investigation of the merits of the question in dispute.(*x*)

Instructions to Ameen.

The Zillah Judge furnishes to the Ameen such part of the proceedings, and such detailed instruction in each case, as

(*v*) Reg. VIII., 1794, Sec. 13, Benares; Reg. LIV., 1795, Sec. 2, Ced. and Conq. Prov.; Reg. VII., 1803, Sec. 2; Con. 968, West. C. 31st July, Cal. C. 21st August, 1835.

(*w*) S. D. 1849, 26th February, p. 40.

(*x*) Reg. XXIII., 1814, Sec. 50, Cl. 1; Cir. Ord. 31st December, 1841; S. D. 1849, 4th September, p. 379; See S. D. 1847, p. 608.

may be necessary for his information and guidance, and enjoins him either merely to take the requisite evidence in the presence of the parties or their Vakeels, and to transmit the same to the Court, or likewise to transmit, with the evidence so taken, a report of his own opinion upon the point at issue founded on the result of the investigation held by him.

Proceedings of Ameen received as evidence.

The proceedings of the Officer are received as evidence in the case with regard to the specific matter which he may have been directed to investigate, but if the Judge shall have reason to be dissatisfied with the proceedings of the Ameen he is at liberty to make such further inquiry as may be requisite, and to pass such ultimate judgment as may appear to him to be right and proper.

Remuneration of Ameen.

Previously however to issuing instructions to an Ameen for the performance of any of these duties, the Judge requires either the plaintiff or the defendant, according to the circumstances of the case, to pay into Court such a sum of money as may be an adequate remuneration to the Ameen for his trouble.(*y*)

The maximum amount of remuneration to be awarded to the Ameen in such cases is (strange to say) twelve annas a day for himself and three annas for the hire of two peadahs, or a total rate of fifteen annas per diem.(*z*)

The presiding authority, at the time of directing the appointment of an Ameen, fixes the period within which he should be required to make his return, and determines the rate of his remuneration, within the limits above laid down, and decides which of the parties shall deposit the amount; and the Ameen cannot be appointed till such sum has been paid in. The Ameen receives one-half when the deposit is made, and the remainder when he has completed his task to the satisfaction of the Court. If he is found to have acted negligently or improperly, the Court may either direct the balance in deposit,

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(*y*) Reg. XXIII., 1814, Sec. 51, Cl. 2; Cir. Ord. 31st December, 1841, para. 4.
(*z*) Cir. Ord. 31st December, 1841, para. 5.

to be refunded to the depositing party,(*a*) or may appoint a second Ameen for the satisfactory completion of the work; the latter is not, however, entitled to receive as remuneration, more than the balance remaining in deposit.

Where the Ameen finds it impracticable to make his return within the period fixed by the Court, he submits a report to that effect, prior to the expiration of that term, stating fully the progress he has made towards execution of the order, and the circumstances which hinder completion within the period allowed. The Court immediately takes the report into consideration, and if it appear that the delay has arisen from neglect of the parties, or either of them, or from other circumstances beyond the control of the Ameen, the Court may grant an extension of time and direct an additional sum to be deposited, within a certain period, for his remuneration. It may at the same time order payment to the Ameen of such portion of the balance of original deposit as may suffice for his immediate expenses. In the event of the further deposit not being made within the time fixed, and if no satisfactory cause be shewn for the delay, the Court orders the Ameen to strike the case off on default, and directs the payment to him of the balance in deposit. When, however, the delay is owing to the neglect of the Ameen, the Court requires him to complete the duty within such further period as it may grant, but does not allow him any additional compensation for that period.

As it is only for the purposes of minute local investigation that the Ameen is deputed, all the main facts in the cause ought to be established by evidence taken in the cause itself, and not merely by the Ameen.(*b*)

Judges appoint Ameens to perform mis-

The Zillah Judges select and appoint as many duly qualified persons as they may deem requisite to act as Ameens, in

(*a*) Rep. Sum. Cases, 13th December, 1841, p. 19; S. D. 1848, 8th March, p. 144; 26th December, 1848, p. 886.

(*b*) See S. D. 1849, p. 444.

cellaneous duties.

the performance of these miscellaneous duties. The Ameen ought to be sworn previous to his deputation: but may be subsequently sworn to his report, and it cannot be acted upon until he has been sworn.(*c*)

The Judges are at liberty to nominate the City and Pergunnah Cazees to those duties, when their services may be available.(*d*)

Ameens to give security.

The persons so appointed are required to furnish security for their personal appearance, and for the faithful discharge of their duty.(*e*)

Each Ameen receives a regular sunnud of appointment, describing the jurisdiction within which he is to act as Ameen, and corresponding exactly with the jurisdiction of Moonsiffs, unless special reasons exist for dividing a Moonsiff's jurisdiction, or for combining two or more jurisdictions under one Ameen.

Not to act by deputy.

The Ameen must perform in person the duties entrusted to him, and is not in any case permitted to act by deputy.

List of Ameens to be affixed in all the Courts of the district.

Lists of the persons so appointed are affixed in the Courts of all the Judges, European and Native, throughout the district.

What persons may not be Ameens for these purposes.

Persons who hold the situation of Ameen for selling distrained property under Act I., 1839 are not to be appointed Ameens for the purposes just described, nor is it deemed expedient in general that Vakeels of the Court directing the inquiry should be appointed.(*f*)

Moonsiff may be employed as Ameen.

The Zillah Judge, and every other, has power to employ any Moonsiff within his jurisdiction in the performance of the duties which have been described in this section; but this power is only to be exercised in very special cases, to be fully recorded in the proceedings of the Courts. The remuneration of the Moonsiff must not exceed that allowed to an Ameen.(*g*)

(*c*) Sel. Rep. 10th January, 1833, v. 5, p. 261; S. D. 1849, 12th December, p. 444.

(*d*) Cir. Ord. Cal. C. 13th January, West. C. 10th February, 1837, para. 4, Cl. 2.

(*e*) Ibid, Cl. 3.

(*f*) Cir. Ord. 15th January, 1845.

(*g*) Cir. Ord. Cal. C. 13th January, West C. 10th February, 1837.

The Judges are at liberty to depute officers of their own establishment to perform any of the prescribed duties, whenever they may consider such a measure necessary.

Additional Officers when measurement is required.

When the measurement of lands, in addition to local inquiries, becomes necessary, the Court may appoint a mohurrer and a nullee or nullees, subordinate to the Ameen, with allowances not exceeding those of the Ameen, but in addition thereto.(*h*)

Native Judges may depute Ameens.

The Subordinate Judges, of every rank, are competent to depute Ameens for the purpose of making local investigations; and they are guided in this respect by the Regulations prescribed for the Zillah Courts.(*i*)

But where a Moonsiff has himself been required by the Judge of a higher Court to make a local investigation, he cannot depute that duty to another.(*j*)

(*h*) Con. 1337, Cal. C. 13th May, West. C. 3rd June, 1842.

(*i*) Cir. Ord. Cal. C. 13th January, West. C. 10th February, 1837, para. 5; Cir. Ord. West. C. 26th July, Cal. C. 1st November, 1833, para. 10.

(*j*) Con. 863, 14th February, 1834.

CHAPTER XXIV.

NATIVE ASSESSORS.

IN the trial of civil suits, originally or on appeal, it is competent(*k*) for the Civil Judges to avail themselves of the assistance of respectable natives in the three following ways :

As a punchaet.

First, by referring the suit, or any point or points in the same, to a punchaet of such persons, who carry on their inquiries apart from the Court and report to it the result. The reference to the punchaet, and its answer, are in writing, and are filed in the suit.

As assessors.

Secondly, by constituting two or more such persons assessors or members of the Court, with a view to the advantages derivable from their observations, particularly in the examination of witnesses. The opinion of each assessor is given separately and discussed; and if any of the assessors, or the authority presiding in the Court, should desire it, the opinions of the assessors are recorded in writing in the suit. The opinion of a single assessor (if one only be appointed) is wholly inoperative.(*l*)

As a jury.

Thirdly, by employing them more nearly as a jury. They then attend during the trial of the suit, they suggest, as it proceeds, such points of enquiry as occur to them; (the Court, if no objection exists, using every endeavour to procure the required information) and after consultation they deliver in their verdict. The mode of selecting the jurors, the number to be employed, and the manner in which their verdict shall be delivered, are left to the discretion of the Judge who presides.

(*k*) Reg. VI., 1832, Cir. Ord West. C. 16th November, 1832, Cal. C. 18th January, 1833.

(*l*) S. D. 1849, 13th June, p. 198.

If the Judge calls in persons to act with him as a jury empowered to sit on the trial throughout, and to suggest as it proceeds such points of inquiry as occur to them; he must treat them strictly as such; and must not treat them as persons to whom he has referred particular questions in the cause.(*m*)

Under all these modes of procedure the decision is vested exclusively in the Judge.

The Judge is to decide.

The presiding officer is at liberty to select either of these three plans indicated, or he may decline to adopt any of them; and if he select either of the plans in question, the particular manner in which it is to be carried into effect is left to his own determination. He possesses no power whatever under Regulation XII., 1825, or otherwise, to compel the attendance of persons who may not choose voluntarily to render their services. He is empowered only to invite their assistance.

Wherever occasion may require the examination and scrutiny of native account-books in any civil case, the European Judges should, as far as possible, call in the aid of assessors for that purpose. Where this course is deemed inexpedient, Ameens ought to be appointed. The Native Courts are not authorized to employ assessors for the purpose stated.(*n*)

The requisition of oaths from persons so employed is not considered to be necessary, and oaths are never to be enforced.

Persons thus employed not required to swear.

(*m*) S. D. 1850, 24th April, p. 150.

(*n*) Cir. Ord. 4th February, 1840, para. 3. See the last Chapter.

CHAPTER XXV.

ARBITRATION.

SECTION I.

IN SUITS NOT RELATING TO LAND.

Where the cause of action exceeds 200 rupees.

IN suits that may be brought before any of the Civil Courts, of whatever rank,(o) concerning disputed accounts, partnerships, debts, doubtful or contested bargains, or non-performance of contracts, on which the cause of action shall exceed two hundred sicca rupees, the Courts are to advise the parties to submit the decision of the matters in dispute to arbitration.(p)

Where the cause of action is less than 200 rupees.

In all suits for money or personal property, the amount or value of which shall not exceed the sum of two hundred sicca rupees, the Courts are empowered, with the consent of the parties, to refer the suit to one arbitrator. The parties or their Vakeels upon agreeing to the reference, shall, on or before the next Court day, mutually choose some one common friend or indifferent person, who may be willing to undertake the arbitration. If the parties shall not agree with respect to the person to be appointed arbitrator, or, if the person nominated by them shall refuse to accept the arbitration, and the parties or their Vakeels cannot agree in their appointment of another person willing to undertake the arbitration; the Court, with the consent of the parties, is to appoint as arbitrator in the

(o) Con. 1292, Cal. C. 26th March, West. C. 10th April, 1841; Con. 1320, Cal. C. 11th February, West. C. 4th March, 1842.

(p) Reg. XVI., 1793, Sec. 2, Benares; Reg. XV., 1795, Sec. 2, Ced. and Conq. Provinces; Reg. XXI., 1803, Sec. 2.

cause, the proprietor of the estate in which the cause of action shall have arisen, or the farmer, if the estate be held in farm of Government, or the Cazee of the pergunnah, or the Tehseeldar, or any other creditable person, provided that the person so to be nominated by the Court, be not in any respect interested in the matter in dispute. But if the parties cannot agree in the nomination of an arbitrator, or if the person whom they may nominate shall refuse to accept the trust, and the parties cannot agree upon the appointment of any other person willing to undertake the arbitration, or shall not consent to the appointment of an arbitrator by the Court, the cause is not to be referred to arbitration, but is to be tried by the Court.

In the event of the parties, or their Vakeels, agreeing in the nomination of an arbitrator willing to accept the arbitration, or to an arbitrator being appointed by the Court, the person so chosen or appointed, shall be the arbitrator in the cause. The parties however, in suits of the nature described in this Section, are to have the option of choosing two or more arbitrators to decide their cause in the same manner as the parties in the causes specified in Section 2.(*q*)

The Judges of the Courts are enjoined to afford every encouragement in their power to persons of character and credit to become arbitrators; but they are not to employ any coercive means for that purpose, nor to permit any of their private servants, or any of the ministerial public officers of their Court, to be arbitrators in a cause. But this prohibition does not extend to the employment of the Sudder Ameen or Law Officer of the Court, or to a Cazee, or to the authorized Vakeels of the Courts.(*r*)

In all cases, the Courts are directed to endeavour, but without using any compulsion, to prevail upon parties to submit

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(*q*) Reg. XVI., 1793, Sec. 3.

(*r*) Cir. Ord. Cal. and West. C. 9th November, 1832; Reg. XXVII., 1814, Sec. 19; Sel. Rep. 10th January 1833, v. 5, p. 261.

their cause to the arbitration of one person to be mutually agreed upon by them. In every case (with the exception of the cases specified in Section 3, which the Courts are empowered to refer to one arbitrator with the consent of the parties) the parties are to choose the arbitrators, who are to decide the matter in dispute without fee or reward.(*s*)

Where the parties agree to arbitration, if the claim is under two hundred rupees, the Judge may, with the consent of the parties, appoint as arbitrator any person of the descriptions abovementioned; but if the claim exceeds two hundred rupees, the parties are themselves to nominate the arbitrator, and it is not competent to the Judge to interfere, directly or indirectly, in the nomination.(*t*)

Canoongoes not compellable to act as arbitrators.

Canoongoes cannot be compelled to attend punchaets, or to act as arbitrators. When the nomination of an arbitrator may rest with the Civil Courts, they should avoid as far as practicable the appointment of Canoongoes, and when such selection may be unavoidable, they should immediately notify the appointment to the Collector that he may provide for the due discharge of the duties of the office.(*u*)

Arbitration bonds.

Whenever a suit shall be submitted to arbitration, the Court in which it may have been instituted, previous to the arbitrator or arbitrators entering upon the arbitration, is to cause the parties to execute arbitration bonds, binding themselves to abide by the award, and agreeing that it be made a decree of the Court. The Court is to fix such time as it may think reasonable, upon a consideration of the nature and circumstances of the case, for the delivery of the award, and the period so fixed is to be specified in the bonds. If the cause shall be referred to two or more arbitrators, the following provisions are to be made for completing the award in the event of the arbitrators not delivering it by the limited time, either from

Time for delivery of award.

(*s*) Reg. XVI., 1793, Sec. 4.

(*t*) Cir. Ord. Cal. and West. C. 12th October, 1838.

(*u*) Con. 286, 4th February, 1818.

disagreement or from any other cause. If the decision of the suit shall be referred to two or more arbitrators, whether an odd or an even number, the parties are to have the option of nominating jointly one person as umpire, or, if the number of arbitrators appointed shall be three or more, being an odd number, to agree that the award given by the majority shall be final, or, to permit the arbitrators to nominate an umpire. The name of the umpire, and the time by which he is to make his award, in the event of the arbitrators not delivering it by the limited period, is to be specified in the bonds, which are to be executed before the arbitrators enter upon the enquiry. In the event of an umpire being appointed, and the arbitrators not agreeing in an award by the limited period, their authority is to cease from such period, and the umpire is to give his award.(*v*)

Appointment of umpire.

It is the duty of the Court, previous to the arbitrator or arbitrators entering upon the arbitration, to cause the parties to agree to some one of the provisions above detailed for completing the award, in the event of the arbitrators not delivering it by the limited time, and where these preliminary engagements have not been specified in the bond, and the arbitrators are not unanimous, their proceedings are void, and the case must be tried anew.(*w*)

When the bonds above described shall have been executed, the Court is to transmit to the arbitrator or arbitrators a copy of the petition of complaint, and by a short writing under the seal of the Court refer to him or them the matters in dispute between the parties. In the trial of the suit the arbitrators are to investigate the matters in dispute, by hearing the pleadings of the parties, and examining their respective witnesses and documents. The Court is to issue the same process to the parties and to the witnesses, whom the arbitrator or arbitrators, or the parties, may desire to have examined, to ap-

Order of reference.

Mode of investigation.

Process.

(*v*) Reg. XVI., 1793, Sec. 5.

(*w*) Con. 395, 24th June, 1825, para. 2.

pear before the arbitrator or arbitrators, and to administer such oaths to the parties and witnesses as the Court is authorized to administer, in causes tried before it, and persons not attending in consequence of such process, or making any default, or refusing to give their testimony, or to sign their depositions, or being guilty of any contempt to the arbitrator or arbitrators during the investigation of the suit, are subject to the like disadvantages, penalties and punishment by order of the arbitrator or arbitrators, as they would incur for the same offences in suits tried before the Court, provided that the arbitrator or arbitrators shall report the order, with the reason for making it, to the Court, and obtain its consent thereto, which is to be signified by the Judge signing the order.

Enlargement of time.

In cases in which an arbitration may be held at a considerable distance from the Court, the Court may grant commissions to the arbitrators to administer the proper oaths to witnesses whom they may be desirous of examining upon oath.(*x*)

In cases where arbitrators or umpires shall not have been able to complete the award by the limited time from want of the necessary evidence or information, or other good and sufficient cause, the Courts are empowered to allow a further time for the delivery of the award. In the first mentioned case, the Courts are to fix a period by which the umpire (if an umpire shall have been appointed) shall deliver his final award, in the event of the arbitrators not completing their award by the expiration of such further time.(*y*)

Award to be made an order of Court.

When a final award in a cause shall be made either by the arbitrators, or the umpire, it is to be submitted to the Court under the seal and signature of the person or persons by whom it may be made, together with all the proceedings, depositions and exhibits in the cause. The Court is to pass a decree conformably to the award, and the decree is to be carried into execution in the same manner as other decrees of the Court.(*z*)

(*x*) Reg. XVI., 1793, Sec. 6.

(*y*) Ibid, Sec. 7.

(*z*) Ibid, Sec. 8.

If, however, there has been excessive delay in the completion of an award, the Courts will exercise their own discretion as to decreeing performance of it.(*a*)

Consequences of delay.

The award of an arbitrator or arbitrators, is not to be set aside, except it be fully proved to the satisfaction of the Court by the oaths of two credible witnesses, that the arbitrator or arbitrators has or have been guilty of gross corruption or partiality in the cause in which the award may be made.(*b*)

Award set aside for corruption or partiality.

SECTION II.

ARBITRATION IN SUITS REGARDING LAND.

PARTIES in suits depending in the Civil Courts of Judicature respecting the property in land, or limited tenures therein, or rights dependent thereon, shall be at liberty, whatever may be the amount or value of the claim,(*c*) to refer their suits to arbitration, and shall by all due means be encouraged by the Courts to resort to that mode of adjusting their differences.(*d*)

Reference of suits relating to land.

The rules contained in Regulation XVI., 1793, and Regulation XXI., 1803, respecting the reference of suits to arbitration, the appointment of arbitrators and umpires, the investigation of suits referred to arbitration, the time and mode of making the award, and the setting aside or confirming the same, are declared applicable to suits referred to arbitration by the Courts of Judicature under this Regulation.(*e*)

SECTION III.

PRIVATE ARBITRATION.

PERSONS between whom disputes may exist respecting the property of land or limited tenures therein, or rights depen-

Private arbitration in disputes relating to land.

(*a*) R. S. C. 15th August, 1842, p 37.
(*b*) Reg. XVI., 1793, Sec. 9.
(*c*) Con. 253, 7th August, 1816.
(*d*) Reg. VI., 1813, Sec. 2, Cl. 1.
(*e*) Ibid, Cl. 2.

dant thereon, whether the same be or be not depending in the Courts of Judicature, are at liberty, without any application to the Courts, to refer the same to private arbitration; for which purpose, the execution of written bonds of arbitration is unnecessary,(*f*) and the awards made by the arbitrators and umpires appointed in such case by the parties, shall be supported and enforced by the Courts under the following rules and limitations.(*g*)

Whenever a dispute respecting the matters above enumerated shall have been referred to private arbitration, and an award shall have been duly made, if either party shall refuse to perform the award, it shall be competent to the other party within the period of six months from the date of the award, to apply summarily to the Civil Court; and upon such application, if the Court, after calling upon the opposite party for his answer, be satisfied that the award was duly made by the arbitrators or umpires appointed by the freewill and consent of the parties, and if such award shall be liable to no impeachment, which would have warranted the setting it aside, if it had been made under the authority of the Court; the Court shall cause it to be summarily executed as a decree of Court, calling upon the arbitrators and umpires, if necessary, to attend and give their assistance in the execution of their award; provided that if such application for the enforcement of a private award shall not be made within the period above prescribed, the Court shall not admit any plea whatever for the delay; but shall reject such application and refer the party preferring it to a regular suit.(*h*)

Confirmation of private award by Court.

Must be applied for within 6 months.

Where the Court is closed on the last day allowed by the law for application to enforce an award, the application may be made on the next ensuing Court day.(*i*)

Effect of private award tendered in regular suits.

Whenever private awards shall be tendered in evidence by the parties in regular suits, the Courts, if such awards shall

(*f*) Con. 1153, Cal. and West. C. 11th May 1838; Cir. Ord. 14th November, 1845.

(*g*) Reg. VI., 1813, Sec. 3, Cl. 1.

(*h*) Reg. VI., 1813, Sec. 3, Cl. 2.

(*i*) Con. 1342, Cal. C. 18th, West. C. 29th March, 1842; R. S. C. 10th May, 1842, p. 31.

appear to have been performed, and the possession of the contested property to have been held under them, shall allow equal validity to the same, as if they had been made under the authority of the Courts. But if the awards tendered shall not have been performed at all, or shall have been performed only in part, the Courts shall not admit the same, unless they are established by clear and satisfactory proof, and are distinct and intelligible so as to admit of easy execution, and the delay which may have occurred in the performance of them is duly accounted for.(*j*) Applications to the Courts for the execution of private awards under the second Clause of Section 3, Regulation VI., 1813, are to be received and enforced under the rules applicable to summary process.(*k*)

Private awards when thus summarily confirmed and enforced by the Court, have the same validity as if made under the authority of the Court, pursuant to the rules contained in Regulation XVI., 1793, and on the trial of a regular suit to set aside a private award thus judicially confirmed, the award, like one originally made under the authority of the Court, should not be set aside, except upon satisfactory proof that the arbitrators have been guilty of gross corruption or partiality.(*l*)

Private awards not relating to land are not enforced.

The provisions of Regulation VI., 1813, above quoted, are confined to awards respecting lands, and rights dependant on them; and an award for debts, or disputed accounts, is not cognizable under that regulation.(*m*)

Irregular awards previous to 1813 confirmed.

No decree which was passed by any Civil Court previous to the promulgation of Regulation VI., 1813, founded either upon an award made under the authority of the Court, or upon a private award respecting the property in land or limited tenures therein, or rights dependant thereon, can now be amended or reversed upon the ground of its being founded on

(*j*) Reg. VI., 1813, Sec. 3, Cl. 3.

(*k*) Cir. Ord. 24th February, 1816, para. 2.

(*l*) Cir. Ord. 24th February, 1816, para. 3.

(*m*) Con. 472, 22nd February, 1828.

an award of arbitration not authorized by the regulations, at the time the award was made, unless such award be open, on the merits, to just impeachment.(*n*)

Judge must not refer award to Criminal Court.

On the application of one of the parties to the Civil Court to cause execution of an arbitration award, the Judge is to determine whether the award should be executed or not. He is not to refer it from the Civil to the Criminal Court, nor to act with reference to proceedings which may have been held by the criminal authorities relating to the case.(*o*)

SECTION IV.

OF CONFIRMING AND ANNULLING AWARDS.

Award not specific remanded for amendment.

WHERE an award is not sufficiently specific, and therefore incapable of being executed—as where it affirms a claim, subject to a deduction for a particular reason, the amount of which deduction it does not specify, the award ought not to be set aside, but to be remanded to the arbitrator with instructions either to specify the amount of the deduction, or not to make any deduction at all.(*p*)

Corruption or partiality how proved.

In order to set aside an award, it is not necessary that partiality or corruption should be proved by the testimony of two witnesses, if the award itself contains internal evidence of corruption or of partiality.

In one case indeed(*q*) where two arbitrators decided a boundary dispute, and adjudged that certain lands were situated within the limits of a particular village, the award was set aside because one of the arbitrators had, in an arbitration held eight years before, decided by an award which was still on record, that the same lands formed part of another village.

This decision probably met the exigencies of justice in the particular case. It must be observed, however, that the

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(*n*) Reg. VI., 1813, Sec. 4.

(*o*) Con. 609, 18th November, 1831.

(*p*) Sel. Rep. 28th November, 1844, v. 7, p. 185.

(*q*) R. S. C. 18th February, 1845, p. 61.

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second investigation might possibly have produced in the mind of the arbitrator an honest conviction that his former award was erroneous. If indeed the contradictory awards had been made in the same case or at the same time, the evidence of corruption or partiality would have been sufficient.

Trivial objections not encouraged.

The Courts do not encourage trivial objections to awards. An action was brought to set aside an award on the ground that one of the two arbitrators had not accompanied the other to the disputed lands for the purpose of local investigation. The award was upheld, as it appeared that the one who visited the spot alone, had done so at the request of the other arbitrator, and with the consent of the parties, that the evidence on both sides was taken in the presence of their respective mooktars, and that the plaintiff made no objection to the award until five months after the award of the arbitrators had been confirmed by the Civil Judge.(*r*)

Court will not examine whether award is equitable.

An award will not be opened merely on the allegation that the award is in itself inequitable, or founded on an error of law, for by submitting to arbitration the parties have agreed to be ruled by the opinion of the arbitrators on these points, and no Court has any cognizance of the matter, by way of appeal from their decision.(*s*)

Award of majority good, unless otherwise provided.

Nor will the award be opened because the award embodies the decision only of the majority; unless, by the particular conditions under which the arbitrators acted, unanimity was essential to the validity of their award.(*t*)

Nor because it is alleged that some of the parties who formally consented to the arbitration are unwilling to abide by the award.(*u*)

Effect of death of one of several arbitrators.

Nor because the award is only made by three out of four arbitrators originally appointed, the three having been permitted to carry on the arbitration for four years without objec-

(*r*) Sel. Rep. 5th February, 1836, vol. 6, p. 51.

(*s*) S. D. 1848, 8th April, p. 296.

(*t*) S. D. 1848, 8th April, p. 301.

(*u*) R. S. C. 18th March, 1848, p.

tion from either party.(*v*) If, in that case, either party had objected, the arbitrators could not have proceeded; but any objection to the authority of an arbitrator is considered as waived, if the party who objected attends before him and treats him as arbitrator.

Effect of irregularities in procedure of arbitrators.

It has been held that an award ought not to be annulled merely because the arbitrator examined witnesses in the absence of the party against whom he decided.

But unless the absence of the party was wilful, there was substantial injustice in such a proceeding, and it must be presumed, that in the case in question there was some evidence that the absence was wilful.(*w*)

Effect of acquiescence.

When no proceedings have been taken for ten years to set aside an award, the Courts will not interfere with it.(*x*)

How far representatives are bound by submission.

If men who submit to arbitration, in the instrument of submission bind their representatives in a case where the action would survive to or against their representatives, although one or both of the parties should die before the award be made, the arbitrator may proceed with the reference: the parties have provided for the event of death, and have agreed that those who take their property, should take it subject to the decision of the arbitrators appointed.

But if the representatives are not included in the reference, and one of the parties die, that reference is determined and the heir taking the property of the deceased party ought not to be considered as bound. A man who agrees to a reference may know that he is capable of giving explanations which his heirs cannot give. He knows that if his opponent be examined as a witness, he may be examined also. For these reasons, he may agree to submit to an arbitration, but not to bind those who are to succeed him.(*y*)

(*v*) S. D. 1848, 4th April, p. 277.

(*w*) S. D. 1848, 26th February, p. 115.

(*x*) Sel. Rep. 22nd March, 1825, v. 4, p. 46; S. D. 1849, 28th June, p. 257.

(*y*) See Knapp. P. C. C. v. 1, p. 100.

CHAPTER XXVI.

COMPROMISE.

IT may happen that the parties to a suit think fit, after a time, to adjust their differences without calling upon the Court to decide them: or that persons between whom disputes exist, arrange them amicably without resorting to the Courts at all.

Deeds of compromise to be stamped.

In the former case it is usual to present to the Court a razeenamah, ruffanamah, soolanamah, or some other written application, by or according to which the suit shall be adjusted, or be capable of adjustment without argument in Court and award of the presiding Judge. Every such instrument bears the stamp required for a pleading in the Court wherein it may be filed.(*z*) In the Moonsiff's Court no stamp is required.(*a*)

If the suit be dismissed before it is called on, plaintiff receives back the stamp duty.

If the suit be dismissed on such application before the pleadings have been completed, and the case called on for hearing, the plaintiff is entitled to recover the stamp duty, which he paid on the institution of the suit: and in order to this, he receives from the Court a certificate, stating the amount of such duty, with a specification of the number and endorsement of the paper filed with the plaint. On presenting the certificate to the Collector of the district, the plaintiff receives back the entire amount of the stamp duty, if there be no exception taken to the paper filed or to the endorsement thereon.(*b*)

(*z*) Reg. X., 1829, Sch. B. Art. 10; Supra, pp. 182, 183, 184.

(*a*) Cir. Ord. Cal. C. 20th July, West. C. 3rd August, 1838; Reg. XIII., 1824, Sec. 3, Cls. 2, 3; Reg. VII., 1832, Sec. 6, Cl. 2; Sel. Rep. 19th September, 1831, v. 5, p. 143.

(*b*) Ibid; See as to the practice in the Courts of the Moonsiff and the Sudder Ameen; Cir. Ord. 9th August, 1833, paras. 1 and 4; Cir. Ord. Cal. and West. C. 10th May, 1833; Cir. Ord. West. C. 14th November, 1834, and the two Cir. Orders next cited below: these orders appear to be contradictory and confused.

The stamped paper on which the original petition of plaint is written, is transmitted to the Collector's office on all occasions of a refund being ordered :(*c*) it is not forwarded to the Superintendent of Stamps for examination previous to making the refund.(*d*)

If the case be called on he receives half the duty.

If the pleadings have been completed, and the case has been called on for decision, or is on the list of causes ready for hearing, the plaintiff receives a certificate as above for half of the amount of stamp duty paid on the plaint.(*e*)

If the adjustment requires decree and execution, no duty refunded.

If the adjustment, by razeenamah or soolanamah, be such as to require a decree to pass, on which process of execution can be taken out, the plaintiff is not entitled to any refund of the stamp duty so paid.(*f*)

In cases decided on acknowledgment of defendant, duty not returned.

In cases of dustburdaree, in which the plaintiff relinquishes the prosecution of his claim, if no razeenamah be filed, the regulations do not authorize a return of the institution fee, or of the stamp duty substituted for it.(*g*)

Requisites of a "bazdaweh" a "ruffanamah," and a "soolanamah."

The adjustment abovementioned implies an amicable settlement of the claim by the mutual consent of both parties, and consequently, a "bazdaweh," if its terms purport simply a withdrawal of the claim on the part of the plaintiff, does not confer upon the party delivering it a right to reimbursement of the amount of stamp duty levied on the plaint. Though the document designated a razeenamah may be executed by one party, it should imply some act of concession or consent on the part of his adversary, and cannot in the absence of such act of concession, or mutual agreement, be deemed a *bonâ fide* instrument of the kind denoted. A "soolanamah," and "ruffanamah," is an instrument requiring and bearing the acknowledgment and verification of both parties to the suit, which would ordinarily entitle the plaintiff or appellant to a refund of the stamp duty.(*h*)

(*c*) Cir. Ord. 29th May, 1840.

(*d*) Cir. Ord. Cal. and West. C. 2nd August, 1839.

(*e*) Ibid.

(*f*) Ibid.

(*g*) Con. 208, 1st June, 1815; Con. 977, 28th August, 1835; Cir. Ord. 23rd January, 1846, para. 5.

(*h*) See the order last cited, para. 3.

A written application, under whatever denomination, notifying an "adjustment" of the point in dispute, that is to say, an amicable settlement thereof by the mutual consent of both parties, provided such document bear the acknowledgment and verification of both parties to the suit, is sufficient to entitle the party, presenting it, to the return of stamp duty under the rules already stated.(*i*)

To whom the money is to be paid.

The treasurer is prohibited from paying the value of the stamp duty refunded on the adjustment of a suit by razeenamah, to any Vakeel or Mooktar, unless he shall be authorized to receive it by a special clause in his vakalutnamah or mooktarnamah; and when no such authority is produced, the money remains in deposit, until the party entitled to receive it shall apply to the Court for an order for payment, and such order be obtained.(*j*)

What fees the Vakeels are entitled to in compromised suits.

If a suit be dismissed on razeenamah, no formal judgment being passed, the Vakeels are entitled to a quarter or half the full fee, according as the razeenamah may have been filed before or after the filing of the pleadings.(*k*)

Where evidence already taken.

In cases adjusted by razeenamah after evidence has been taken, the Vakeels are entitled to their full fees, in like manner as if no razeenamah had been admitted.(*l*)

Adjusted case struck off the file.

When a suit is thus adjusted, it is struck off the file on mutual application, and the value of the stamped paper is returned to the plaintiff; and no execution can be taken out when a suit is disposed of in this way.(*m*)

Effect of concealment at time of compromise.

If an adjustment of claims be made, by division of property, and if any part of the divisible property is fraudulently concealed when the adjustment is made, the compromise will be set aside so far as regards the property concealed, but no further.(*n*)

(*i*) See the order last cited, para. 4.

(*j*) Cir. Ord. Cal. and West. C. 3rd January, 1834.

(*k*) Con. 209, 1st June, 1815.

(*l*) Con. 418, 5th May, 1826.

(*m*) R. S. C. 16th November, 1840; 16th June, 1841, p. 49.

(*n*) Sel. Rep. 14th September, 1843, v. 7, p. 131.

Compromise liberally construed.

A deed of compromise is construed liberally by the Courts; and where it proceeds upon a principle definitely laid down, but by an oversight some of the property which ought to be included in the division effected by the compromise has been left out, the Court will decree division of that property also, according to the true intent of the deed of compromise.(*o*)

So where it conveys a right to certain lands but is silent as to the mesne profits, it will be held to convey a right to the latter also, if clearly within the principle of the arrangement.(*p*)

Effect of fraud, violence or mistake.

If a man has been frightened, surprised, forced, or cheated into executing a compromise, or into transacting any matter of business, the transaction is liable to be set aside; but the proof must be very clear and free from suspicion, otherwise the evidence of his own hand will prevail: and a man's ignorance of his legal rights at the time of the compromise will not excuse him from performing it, if no deceit has been practised.(*q*)

It would seem that if a compromise of rights in suit be made, and if the compromise rests not on the act of the Vakeels of the parties in Court, but on the act of the parties out of Court, and it appears that one of the parties did not really take part in the compromise, the mere fact that the deed of compromise has been duly filed and acknowledged by the pleaders of the parties, will not make it a binding compromise.(*r*)

What evidence of terms will be received.

Where a written instrument of compromise, or a bazeenamah or relinquishment of demand, is alleged by either party to contain only part of the real terms upon which the dispute was adjusted, the Courts will receive evidence in support of such allegation, and will give effect to the additional articles if clearly proved, or if they can be inferred from the terms of the compromise, even though not consistent with the language

(*o*) Sel. Rep. 17th January, 1832, v. 5, p. 159; See Ibid, p. 307.

(*p*) Sel. Rep. 14th June, 1847, v. 7, p. 341.

(*q*) Sel. Rep. 2nd July, 1825, v. 4, p. 80; Ibid, 27th July, 1812, v. 2, p. 23. Supra, pp. 187, 227.

(*r*) S. D., 1848, 20th July, p. 701.

of the written instrument; as where a claim is stated in the instrument to be relinquished through compassion, and a separate money consideration is proved: but not if they be wholly repugnant to the instrument which the parties have executed.(*s*) It is manifest that this is a very difficult branch of jurisdiction, and that the Courts ought to act with extreme caution.

If one party does not comply with the conditions of a compromise, the other is not bound by it, and it cannot be used as evidence to reduce his claim.(*t*)

Effect of part performance.

But where(*u*) the terms of compromise have been in part fulfilled, and the party still has it in his power to perform the remaining conditions, the Court will give full effect to the compromise on the performance of the remaining conditions: and this even though the time fixed by the deed for the fulfilment of the conditions has gone by. But not if the deed contained an express disputation that the compromise should be void unless the conditions were performed within a given time, or if it was in any other way made clear, that time was of the essence of the compromise.

Court cannot refuse to allow claim to be withdrawn.

Where the plaintiff presents a petition praying for leave to withdraw his claim, it is not competent for the Court to reject the petition and to decree in favor of the plaintiff.(*v*)

Even if it be alleged by a third party, who is not regularly before the Court in the suit, that such a petition as that just mentioned, or any compromise of a suit, is collusive, and intended to defraud him, this objection cannot be listened to, as the compromise can only affect those who are parties to it.(*w*)

(*s*) Sel. Rep. 5th June, 1807, v. 1, p. 188; Ibid, 7th April, 1831, v. 5, p. 107; Ibid, 18th December, 1807, v. 1, p. 222.

(*t*) Sel. Rep. 27th April, 1837, v. 6, p. 160; See Sel. Rep. 7th September, 1846, v. 7, p. 279.

(*u*) Sel. Rep. 18th December, 1807, v. 1, p. 222.

(*v*) Sel. Rep. 11th September, 1837, v. 6, p. 181.

(*w*) Sel. Rep. 19th April, 1845, p. 202; S. D. 1848, 20th July, p. 701. See Infra, Chapter XXXIV.

When the compromise of a suit has been finally agreed upon by deed, it will be enforced by the Court, and cannot be evaded by the retracting party making default in filing his razeenamah in Court in the cause.(*x*)

An offer to compromise is not an admission of the claim.(*y*)

(*x*) Meeani Ram Awasty *v.* Sheochurn Awasty, 4 Moore's Indian Cases, p. 114.

(*y*) Supra, p. 63. As to evidence of compromise, see S. D. 1850, 22nd April, p. 142.

CHAPTER XXVII.

DECREES.

SECTION I.

FORM OF DECREES.

The Court is to give judgment.

WHEN the witnesses on both sides have been examined, and the exhibits received, the case is fully heard and discussed upon the evidence, and the duty of the Judge is to give judgment according to justice and right, and also (subject to the modifications stated below) to order costs to be paid to the party in whose favor the decree may be made.(*z*)

The judgment is embodied in a decree, which forms the record of it.

The decree is sealed with the seal of the Court, and is signed by the Judge, and dated on the day on which it may be passed.(*a*)

Decision and reasons recorded by Judge personally.

So much of the decree as comprises the points fixed for decision, the decision thereon, and the reasons of the decision, is directed by law(*b*) to be recorded by the Judge, of whatever rank he may be, in his own handwriting, and in his own mother tongue, and to be signed by him at the time of pronouncing such decision and filed with the record of the cause.

Judgment to be signed and delivered when pronounced.

The Judge may prepare this document wherever he pleases, but the decision, with the reasons for it, must be announced and

(*z*) Reg. IV, 1793, Sec. 7, Benares; Reg. VII., 1795, Sec. 2, Ced. and Conq. Prov.; Reg. II., 1803, Sec. 9.

(*a*) Reg. IV., 1793, Sec. 26, Benares; Reg. VIII., 1795, Sec. 2, Ced. and Conq. Prov.; Reg. III., 1803, Sec. 27; Cir. Ord. 27th April, 1796.

(*b*) Act XII. of 1843.

signed and delivered in Court at the time of pronouncing it. There is nothing to prevent the Judge from reading it aloud in Court and profiting by the observations of the parties if they deserve consideration, but when it has been signed and delivered, it cannot afterwards be altered; and the Judge is not allowed merely to express in general terms the purport of his decree, reserving to himself liberty to insert, in the absence of the parties, reasons which they may have had no opportunity of discussing. Where these requisitions of the law are not complied with, the decision is an absolute nullity.(*c*)

Where the language of the Judge is not the vernacular language, commonly used in the Court wherein the suit was instituted, the minute thus recorded is translated into the vernacular language.

This translation (or the original minute, if the vernacular be the Judge's own language) is incorporated in the decree.(*d*)

The decisions recorded by subordinate Judges in their own hand, are copied into a book, consecutively, by a writer or mohurir, and signed by the deciding officer, in attestation of the correctness of the transcript.(*e*)

The decisions of the Zillah Judges recorded in English are transcribed and forwarded to the Sudder Court, which causes them to be printed monthly at the Presidency.

A copy of a decision thus recorded in English must be given to the parties on application.(*f*)

Where deceased Judge has left decision unsigned.

Where a Judge has died leaving a decision unsigned, his successor examines the Vakeels of the parties in whose presence the decision was given, and the person who wrote it out, and compares it with any notes in the handwriting of the late Judge, which may be forthcoming; and unless the result of the enquiry should lead him to doubt the genuineness of the decision, he signs it with a memorandum explaining why it is signed by him.(*g*)

(*c*) S. D. 1849, 7th June, p. 181.

(*d*) Act XII. 1843; Cir. Ord. 16th August, 1844.

(*e*) Cir. Ord. 28th February, 1845.

(*f*) R. S. C. 8th June, 1846, p. 80.

(*g*) Con. 910, 17th October, 1834.

In order to ensure regularity and uniformity in the manner of preparing decrees, certain general rules have been laid down, which are here set forth in the words of the Circular Order(*h*) by which they are prescribed, although they allude to various proceedings which have not yet been considered in detail.

Rules for preparing decrees.

At the head of decrees passed in original suits, shall be stated the number of the case "*original*," and whether instituted in the trying Court, or referred by a superior Court or transferred from a Court of co-ordinate jurisdiction, and in each case the designation of such Court, as well as the aggregate value of the claim, shall be specified; immediately after these particulars will follow the heading of the decree in the following form:—"Decree of the Court of before Judge, Principal Sudder Ameen, or Sudder Ameen or Moonsiff of , passed on the of 18 , corresponding with the of 12 , Fussily, or Hijree, or Bengali," according to the eras locally known and current. In the decrees of those Courts which have only original jurisdiction, the word "original" may be omitted.(*i*)

Particulars to be given at the head.

Form of heading.

Decrees of Court having only original jurisdiction.

Subsequently to the heading, as above, will be exhibited on the one side the names of all plaintiffs, and all the defendants and of all third(*j*) parties (oozardars) if there be any, without the word et cetera or others, and on the other side, opposite to the name of the parties respectively, the names of their pleaders, or if any of the parties plead personally, the word "in person" (assalutun) shall be entered opposite his name, and his presence or absence shall be certified in the same place by the addition of "hazir or ghair hazir."(*k*)

Names of parties, and pleaders.

A vacant space being left to the right and left of the paper, the description of the claim, and of the thing claimed, its valuation and the foundation of the claim will then be entered with a specification of the commencement or close of the

Description of claim.

(*h*) Cir. Ord. 12th February, 1847.

(*i*) Ibid, para. 3.

(*j*) See Infra, Chapter XXXIV.

(*k*) Cir. Ord. 12th February, 1847, para. 4.

period to which the claim relates, in cases calling for such specification (as claims for interest, wasilat, adjustment of accounts or rents:) if the amount of the claim have been increased or reduced by a supplementary plaint, the facts shall be here stated in the decree, (only by those Courts of course that are entitled to receive supplementary plaints,) and the whole amount of the claim, as thus adjusted, shall be distinctly declared.(*l*)

Note of attendance of the parties.

After the above will be stated the attendance or non-attendance of the parties or their pleaders, correspondingly with the statement given in the final proceeding; secondly, particulars regarding the date, both according to the English calendar and the eras locally current, in which the suit was instituted, and if the plaintiff be a pauper, the date of his application to be permitted to sue in that capacity and of his pauperism being admitted; and thirdly, the date on which the petition of plaint may have been filed or received in the office; and fourthly, an abstract of the grounds of suit. It will not be necessary to notice the several steps taken to prepare the case for adjudication, or to state the order in which the several papers were filed, except in particular cases, as for instance when the suit may have been referred by a higher or transferred from a tribunal of equal degree, or when it may relate to property situate in different jurisdictions though based on the same cause of action; in which case the acquisition of the Sudder Court's authority for its hearing and decision in that particular Court agreeably to Circular Order No. 29, dated 11th January 1839, must be mentioned; or when Government may be one of the defendants to the action, in which case the assent of the Commissioner to the formal institution and trial of the suit under Regulation II. of 1826, must be stated; in this place, should the circumstances of the case be such as to require it, the death of any of the parties to the action and the substitution of his heir, and particulars preli-

Date of institution of suit.

(*l*) Cir. Ord. 12th February, 1847, para. 5.

minary to the adjudication of the suit *exparte* in the event of the plaintiff's claim being decreed either in whole or in part, as well as the reason of any witnesses not having been summoned, or if summoned, of their evidence not having been recorded, shall be entered.(*m*)

Substance of petition of plaint.

The substance of the petition of plaint is then to be given, (all redundancies both of language and matter being carefully eschewed,) and it will include a specification of the date on which the cause of action according to the plaintiff's statement arose, as well as genealogical tables if filed, the names of the defendants at length, with the parentage of those who may have the same name (if that be ascertainable from the plaint or the proceedings in the case,) and the place of residence; of all the reasons given by the plaintiff for including among the defendants, any person out of possession of the property sued for, and the pleas urged by him for admission of the suit notwithstanding the expiry of the period, allowed by the statute of limitations for the cognizance of civil actions. After this, the substance of the supplementary plaint, if any have been entered, with the date of its presentation, will be stated with the same regard to conciseness, (notwithstanding that it do not follow next in order according to date of presentation,) and the property claimed will be here specified; then will follow an abstract of the answer, and the supplemental answer (with the date of presentation as in the case of a supplemental plaint) including only those parts which do actually reply to the subject matter of the plaint; the substance of the replication, if it contain any matter touching on the statements of the defendant's answer, and similarly of the rejoinder, with dates of their presentation respectively, will be next entered, and last of all, the abstracts of the petitions and objections of third parties will be stated. If no rejoinder be filed, the fact should be mentioned.(*n*)

Supplementary plaint.

Answer and supplementary answer.

Replication.

Rejoinder.

Petitions of third parties.

(*m*) Cir. Ord. 12th February 1847, para. 6.

(*n*) Ibid, para. 7.

Statement of issues.

Next in order will be inserted a brief abstract of the proceedings prescribed by Section 10, Regulation XXVI., 1814.(o)

List of exhibits and witnesses of plaintiff.

A list of the documents filed and the names of the witnesses called on the plaintiff's part, with the titles and numbers of the several papers in order of presentation, and a specification of the matter, which they were respectively intended by the plaintiff to prove, will here be entered, and the substance of any document which may be declared by the plaintiff to be the foundation of his claim, or to be adminicular to its proof, should be given, provided that the purport and the terms of the said documents be contested. In like manner the documents presented and the witnesses subpœnaed on the part of the defendant should be particularized and any orders rejecting applications of the parties for the admission of proofs offered, or fining pleaders for filing documents on unstamped paper or paper of insufficient value, or returning documents to be stamped under Circular Order No. 179, dated 31st January 1842, or relating to the admission of review of judgment (if that have occurred) with their respective dates, should be mentioned; and if the decision of the case turn on the report of an ameen, its substance and the fact of his having been sworn to the faithful discharge of his duty (an observance which is essential to the reception of his report as evidence)(p) should be stated with its date. Next in order will appear a copy of the futwa or bewastah, or the award of arbitrators, or the soolanamah of the parties, if the case have been determined with special reference to such papers; and, subject to the same condition the enquiries made from parties or their pleaders, and the answers received, together with the date of the proceeding in which they are recorded will be entered.(q) Here will be recorded the reasons given by the deciding officer, in the precise terms in which the judgment drawn up agreeably to Act

Where substance of document is to be given.

Exhibits and witnesses of defendant.

Evidence rejected.

Fines.

Review of judgment.

Ameen's report.

Futwa, or bewastah, or award of arbitration, or soolanamah.

The ground of judgment.

(o) Cir. Ord. 12th February 1847, para. 8.

(p) Supra; p. 208.

(q) Supra; pp. 208, 209, 226.

XII., 1843, may be expressed, and the Judges are required to specify distinctly the grounds of their judgment, and the evidence, oral or documentary, on which it is based, and to state in their "order" the thing decreed, whenever the decree may not exactly correspond with the claim preferred, specifying the articles or portions of property or other thing claimed, which may have been exempted from the judicial award made in favour of the plaintiff.(r)

The thing decreed.

Immediately under the "order" will be entered an account, shewing the exact sum, principal and interest, to which the plaintiff may have been declared entitled up to the date of decree, and subsequently to this account will be inserted the costs of the parties payable either at the time or thereafter, in the event of appeal being preferred by the losing party.(s)

The sum decreed

Costs.

The Courts are to insert in their decrees all sums paid or payable by the parties under the regulations, on account of fees or stamp duties, as well as on account of compensation for the expense of witnesses, and of subsistence money to peons employed in serving the processes of the Courts, and of all other costs and expenses of the suit. Such costs and expenses shall be ultimately charged to the parties cast or to the parties respectively, in such proportions as the Court may deem equitable.(t)

The title of each paper, viz., plaint, answer, oral interrogatory, or other matter should be inserted in the margin of the decree opposite that part in which the subject matter of each paper may be recorded.(u)

Whenever a date which may affect the decision of the case, may be mentioned either in the heading or in the body of the decree, the date corresponding thereto, which may be locally current, shall be invariably stated, and the names of parties, as well as villages and pergunnahs, wherever occurring, shall

(r) Cir. Ord. 12th February, 1847, para. 9.

(s) Ibid, para. 10.

(t) Reg. XXVII., 1814, Sec. 27.

(u) Cir. Ord. 12th February, 1847, para. 11.

be written in clear legible characters, each letter being correctly punctuated.(*v*)

SECTION II.

SUBSTANCE OF DECREES.

Decree must shew that the investigation has been complete.

THE decree ought(*w*) to enumerate all the material allegations and pleas on either side; it ought to shew that the Judge has duly enquired into their truth, by calling for evidence where necessary, and by full consideration of the evidence laid before him; and he must record whether they have been substantiated or not; so that it may appear clearly that no material allegation or plea has been overlooked by the Court in forming its judgment; and costs ought not to be awarded against a successful party, without an explicit statement of the reason.

Reasons must be fully recorded.

The Judge must record his reasons at large, and must make clear the principle upon which his judgment is founded. Thus if he awards damages which appear trifling in amount, in respect of an injury which appears a grave one, the reasons ought to be set forth in the decree.(*x*)

It is irregular to say merely that with reference to the witnesses adduced by the plaintiff and the accounts filed by the defendant, the claim is not proved against the defendant,(*y*) or that the defendant's witnesses are adverse to the plaintiff's claim, but that he, the Judge, has no grounds for giving the preference to the witnesses of one side rather than the other.(*z*)

All facts and evidence must be positively found.

The Court must record its opinion positively as to the genuineness of all documentary evidence laid before it, in order

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(*v*) Cir. Ord. 12th February, 1847, para. 14.

(*w*) S. D, 1847, 24th August, p. 469; S. D. 1848, 29th February, p. 121; 2nd March, p. 133; 7th March, p. 139; 9th March, p. 176; 15th January, p. 14; Ibid. p. 15; 8th May, p. 424; S. D. 1849, pp. 81, 241, 242; S. D. 1850, 26th March, pp. 71, 72, 73; 28th March, pp. 79, 80; 6th April, p. 104; 13th April, p. 109.

(*x*) S. D. 1850, 13th April, p. 109.

(*y*) S. D. 1847, 23rd August, p. 469.

(*z*) Ibid, p. 470; S. D. 1849, 7th November, p. 426.

that it may appear distinctly whether such evidence was admitted or rejected, and that there may be no doubt as to the grounds upon which the Court has proceeded.(*a*)

The facts of every kind on which the Court proceeds must be positively found, and their truth must not be left in doubt by the language of the decree. Every material date of an occurrence must be recorded and also the dates of all the documents upon which the decision is based.(*b*)

Decision must be founded on an intelligible principle.

The decision must be founded upon some intelligible principle, and is not to be a mere conjecture, or a compromise to escape from a difficulty.(*c*)

Where a Judge finds it difficult to come to any conclusion on the evidence as to boundaries, he is not on that account to give the land to the litigating parties according as it lies contiguous to, or at a distance from, their respective estates, but he is to dispose of the case upon the evidence, oral and documentary, in the suit.

Not to rest simply on admission.

No decree can be given simply on the admission of the claim by the defendant, without proof of it by the plaintiff.(*d*)

Decree ought to be complete in itself.

The Judge, in recording his decision, ought to set forth his reasons in the decree itself, and it is irregular to refer to another proceeding for the grounds of his opinion(*e*) or to refer to a document filed in another case, without requiring the parties interested to file a copy of it in the case under decision.(*f*) He must not found his decision upon any matter not placed on the record before him.(*g*)

Decree not to contain extra judicial matter.

The judgment ought not to contain any merely speculative opinion or any extra judicial suggestion,(*h*) such as an intima-

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(*a*) S. D. 1848, 13th June, p. 527; S. D. 1849, p. 303.

(*b*) S. D. 1848, pp. 120, 703; 7th August, p. 750; 1849, 6th January, p. 2.

(*c*) S. D. 1848, 7th June, p. 518; 1st August, p. 733.

(*d*) Cir. Ord. 25th November, 1847, para. 2; Supra, pp. 180, 219.

(*e*) S. D. 1847, 23rd January, p 20.

(*f*) S. D. 1848, 20th August, p. 791; Supra, p. 264.

(*g*) S. D. 1848, p. 352; S. D. 1850, p. 117.

(*h*) S. D. 1847, 6th May, p. 135; Supra, p. 213.

tion that costs which it orders a man to pay, may be reclaimed by him in another suit.(*i*)

Investigation by Ameen to be fully noticed.

A decree based upon the report of the Ameen deputed to make local inquiry, ought not merely to refer to that report, but ought to state the nature of the enquiry, conducted by the Ameen, and how the result tended to establish the view affirmed by the decree.(*j*)

Where an Ameen deputed to make local enquiry has in the course of his duty framed and filed in Court a map of the property in dispute, the Court, if it does not adopt the map, must assign reasons for rejecting it,(*k*) and the reports of Ameens must not be set aside without clearly recording the reason.(*l*)

Where a case is intricate and requires full details and specific grounds to be laid down for the understanding of the judgment, it is not to be disposed of by remarking generally that the defendants have in concert one with the other, collusively defrauded the plaintiff of his rights.(*m*)

Inferences of the Court to be distinctly stated.

The judgment ought to be expressed in the clearest and most precise language. If a fact be deemed worthy of notice, such as the neglect of a party to adopt a particular proceeding, the inference of the Judge ought to be distinctly stated, viz., whether he considers such neglect as corroborative of the evidence against the claim of that party, or whether he considers that the neglect itself renders him liable to a nonsuit; and a dismissal ought not to be ordered upon grounds (such as the want of parties) which would only support a nonsuit.(*n*)

Decree not to shew rejection of claim of several on grounds applicable to one.

If there be several plaintiffs, the claims of all must not be rejected, while evidence is recorded which only militates against the claim of one of them.(*o*)

(*i*) S. D. 1849, pp. 398, 281; see Sel. Rep. 14th August, 1817, v. 2, p. 247.

(*j*) S. D. 1847, 4th February, p. 40.

(*k*) S. D. 1848, 9th May, p. 426; 11th May, pp. 440, 441; 18th May, p. 458.

(*l*) S. D. 1850, May 21st, p. 219.

(*m*) S. D. 1850, 20th May, p. 217.

(*n*) S. D. 1848, 30th March, p. 263; Ibid, 6th April, p. 288; Supra, pp. 196, 204.

(*o*) S. D. 1848, 15th June, p. 532; See p. 291, Supra.

Nor ought an entire claim to be dismissed because part of it cannot be supported.

Whole claim not to be dismissed because part is bad.

Where a man sued to establish his right to assess lands, held by the defendant, and also to recover from him rent at a higher rate than that which he had previously paid; the latter portion of the claim failed, because the plaintiff failed to prove that the notice prescribed by Regulation V., 1812, Sections 9 and 10, had been served upon the defendant, but it was held to be an error to dismiss the entire plaint upon this ground.(*p*)

So where the plaint claims the possession of land, and alleges that the plaintiff was ousted partly at a time beyond the period of limitation, and partly at a time within the period of limitation; it is erroneous to dismiss the whole claim as barred by the rule of limitation, unless it be expressly recorded in the decree, as a fact ascertained, that the allegation of partial ouster within the period is untrue.(*q*)

A claim to land ought not to be dismissed altogether, where it is only partially disputed by the defendant. If indeed the claim as to the part admitted by the defendant, has been put forward without necessity, or under circumstances which render it improper for the Court to enforce it, the decree ought to state those circumstances in detail.(*r*)

Claim only partially disputed must not be wholly dismissed.

Although misjoinder of claims is a cause of nonsuit, and not of dismissal, yet a claim which would in itself be manifestly liable to absolute dismissal (as where it is barred by the rule of limitation) will not be protected from that sentence by being joined with a claim wholly different. The plaint will be absolutely dismissed, so far as regards the former claim, and in respect of the latter the decree will be for a nonsuit.(*s*)

Where there should be nonsuit as to part and dismissal as to part.

Where two parties to a bond are jointly sued for the money thereby secured, and the whole is decreed to be paid by one

Decree against one of two parties sued jointly should state

(*p*) S. D. 1848, 12th September, p. 812.

(*q*) S. D. 1848, 19th September, p. 832.

(*r*) S. D. 1847, 1st December, p. 617.

(*s*) S. D. 1849, 23rd May, p. 161; Supra, p. 199.

grounds of exonerating the other.

of the defendants, the decree ought to state the grounds upon which the other defendant has been exempted.(*t*)

The decree not to award things not sought for.

The Judge is to give or to withhold wholly or in part that which is sought by the plaintiff, but is not to give him what he does not ask for.(*u*) Thus where a man sues for rent for the years 1241 to 1249 B. S., it is erroneous to declare him entitled to receive rent from the year 1250.

So if the Judge awards interest or wasilat at a higher rate,(*v*) or from an earlier period(*w*) than that which has been specified in the plaint: or if in decreeing possession of lands, he awards wasilat from the date of dispossession, the plaint not having claimed wasilat at all: in which case it ought only to be given from the date of suit.(*x*)

Where the plaintiff's claim is a specific one, for the value of a crop carried away from his land by the defendant, claiming to be landlord, the Court must simply award or refuse to award this value to the plaintiff, and must not, in rejecting the claim, proceed to fix the rate at which the plaintiff shall hereafter pay rent.(*y*) So if the action be brought to obtain a receipt for rents actually paid, the Court is to dispose of that claim only, and is not to enter upon and decide the extent of the plaintiff's jumma or rent.(*z*)

Where the claim is for possession only, the decree ought not to award an enhancement of the rent of under-tenants holding by an alleged mokurreree tenure. The plaintiff must bring a fresh suit for such enhancement if he conceives himself entitled to it.(*a*)

Where A. sues B. for exacting from him, A., an excessive rent, the Court cannot adjudicate upon a claim of C. to be the

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(*t*) S. D. 1847, 2nd October. p. 598.

(*u*) Sel. Rep. 19th September, 1831, v. 5, p. 143; S. D. 1848, 3rd June, p. 503; 4th July, pp. 638, 642.

(*v*) R. S. C. 14th August, 1847, p. 116; Sel. Rep. 21st August, 1847, v. 7, p. 387.

(*w*) S. D. 1848, 22nd May, p. 471; Ibid, p. 687; Ibid, 7th August, p. 749.

(*x*) S. D. 1849, 23rd August, p. 363.

(*y*) S. D. 1848, 6th March, p. 135,

(*z*) S. D. 1848, 7th August, p. 751.

(*a*) S. D. 1849, 8th August, p. 333.

real holder of part of the land which is stated in the pleadings to belong to the tenure for which the rent was taken.(*b*)

Where a zemindar sues to resume lands held on an alleged rent-free tenure, the only question for the Court to determine is the validity or invalidity of the tenure, and not the amount of rent which can be assessed thereon. The decree, if in favour of the plaintiff, should merely declare the land liable to assessment.(*c*)

Where the suit is to recover money lent and not to enforce the security upon which it was lent, the decree ought to be simply for the money, and ought not to touch the property pledged as security.(*d*)

Where a regular suit is brought to reverse the decision of a Collector on a claim for rent, the merits of the claim for rent, and not the regularity of the proceedings before the Collector, form the subject of adjudication in the suit.(*e*)

Not to adjudicate upon rights of stranger.

The Court ought not to concern itself with the rights of persons who are not before it, and who ought to sue separately to establish their claims. If a mortgagee sue to foreclose his mortgagor, the Court, if the plaintiff proves his case, ought simply to decide whether the deed of conditional sale is to be rendered absolute, and the mortgagee to be set in the place of the mortgagor.(*f*) It ought not to declare by its decree, the rights of a stranger who comes in by petition after the institution of the suit, and claims by a title higher than that of the mortgagor.(*g*)

Claim made on one title not to be affirmed on wholly different title.

If a claim be definite, and be made upon one distinct ground, as for instance where property is claimed by virtue of a deed—and if the Court decide that the ground is invalid, it is not competent to adjudge to the claimant a portion of

(*b*) S. D. 1849, p. 349.

(*c*) Con. 576, 1st October, 1830, para. 5.

(*d*) Sel. Rep. 5th June, 1843, v. 7, p. 125.

(*e*) S. D. 1850, 16th May, p. 208; See pp. 215, 216, Supra.

(*f*) Sel. Rep. 5th April, 1816, v. 2, p. 178.

(*g*) Sel. Rep. 12th February, 1848, v. 7, p. 439; Infra, Chap. XXXIV.

the property sued for, upon some other title, which he has not himself put forward in the pleadings.(*h*)

A cause ought not to be decided in favour of a party, upon a plea not put forward by the party himself. If a defendant by his answer either expressly or virtually adopts as right, or waives his objections to, some position which he might have contested, and takes issue upon a different point; then, since the plaintiff has not had an opportunity of contesting the matter so put out of controversy by the defendant, it is unjust to decide in favour of the defendant because of the matter so waived.(*i*)

Decision on plea not pleaded.

Thus where a man(*j*) is sued for a debt contracted by his father, and pleads, not that he has succeeded to no property of his father's, and is therefore not liable to pay, but simply that the debt has been discharged; this is a tacit admission of the inability to pay, and the Court cannot decide in favour of the defendant on the ground that he has succeeded to no inheritance and therefore is not liable: for if he had pleaded his non-liability on this ground, the plaintiff might perhaps have proved that he had received property of his father's.

But if the claim advanced by the plaintiff be one which upon the face of the proceedings is clearly illegal, it can never be the duty of the Court to enforce such a claim, even though the defendant may have mistaken his true ground of defence.

Court must decide according to law though points not urged.

The law of Hindoos and Mahomedans is a subject supposed to be known to the Court itself, and the Court must decide all questions which may arise upon it. However desirable it may be therefore, that all points as well of law as of fact may be fully discussed before judgment is passed, the Court must decide according to its own knowledge of the law, and must not decide against a party who really has the law on his side,

(*h*) Sel. Rep. 28th January, 1833, v. 5, p. 262; S. D. 1849, July 12th, p. 286; S. D. 1850, April 17th, p. 117; 6th May, p. 175; 20th May, p. 210; Supra, p. 114.

(*i*) Supra, p. 192.

(*j*) Sel. Rep. 9th June, 1847, v. 7, p. 314; and see S. D. 1848, pp. 188, 352.

merely because his pleader has failed to point out the true application of the law to the facts.(*k*)

Thus where an estate paying revenue direct to Government was sold for arrears of revenue, A. being the ostensible purchaser; a suit by B. against A., claiming to participate in the purchase, was liable under the 22nd section (since repealed) of Act XII., 1841, (requiring the real to be also the ostensible purchaser) to be dismissed with costs, whether the defendant pleaded that act or not.(*l*)

So if the plaint be wholly inconsistent with itself; as where a person sues as heir, alleging in the plaint some fact from which the law infers that another person exists having a prior right by inheritance; this is a repugnancy apparent on the face of the plaint and it is impossible for the Court to pronounce any decree on the merits; an order of nonsuit is therefore passed in such a case, whether the defendant insists on the repugnancy or not.(*m*)

A decree is bad, if its different parts be grossly inconsistent with each other, or with any part of the record,(*n*) or if it be professedly based on the written opinion of a law officer of the Court, and be inconsistent with that opinion;(*o*) or if it proceeds upon a mistranslation of a material document,(*p*) or a misconception of its purport or a material misstatement as to the points which have or have not been urged in the pleadings,(*q*) or if it shews that the Judge has failed to advert to any very important piece of evidence.(*r*)

Correction of manifest error in decree.

In the Sudder Court, a manifest error in a decree of that Court, such as the making costs payable by the successful instead of by the losing party, may be amended by the Judge who pronounced the decree, or, in his absence, by two other

(*k*) Sumboochunder Chowdry *v.* Naraini Dibeh, 3 Knapp's P. C.C. 55.

(*l*) S. D. 1848, pp. 537, 874.

(*m*) S. D. 1848, p. 762. See 3, Knapp's P. C. C. p. 60; Supra, p. 189.

(*n*) S. D. 1850, 30th March, p. 86; 19th March, p. 60.

(*o*) S. D. 1850, 23rd January, p. 5.

(*p*) S. D. 1850, 13th February, p. 19; 30th March, p. 87.

(*q*) S. D. 1850, 31st January, p. 15.

(*r*) S. D. 1850, 21st February, p. 23.

Judges of the Court, and no application for a review is necessary. There seems therefore to be no reason why a Judge of an inferior Court should not correct such an error in a decree passed by himself or by his predecessor.(s)

Ought to fix date from which profits are given.

A decree awarding wasilat or mesne profits ought to state precisely the period from which it awards them.(t)

Decree should state in detail how far conditions have been performed.

Where the validity of a claim depends upon the due performance of certain conditions by the claimant—as in a claim of pre-emption under the Mahomedan law, which requires particular acts to be done within a limited time,—the Court(u) should record in detail what it considers the condition to be, and what it considers to have been established by the evidence in relation to the performance or non-performance of the condition; and it ought not merely to state that the requirements of the law have or have not been complied with; the very mode of performance is necessary to be known and the objection to the mode, which has been resorted to, must be disposed of seriatim; for without these particulars it is impossible for the Court of Appeal to know whether the Judge has taken a correct view of the law or not.

A decree which upholds a tenure as rent-free under Section 2, Regulation XIX., 1793, ought to shew clearly how the evidence in the case establishes the conditions required by that law; viz., that the rent-free tenure has subsisted from before the 12th August 1765, and that there has been no disturbance of possession.(v)

Where the question is whether a portion of an ancestral estate is liable to sale for debt incurred by the widow of a deceased proprietor, the validity of the debt, as a charge upon the estate, depends upon whether it was contracted for the purpose of defraying expenses chargeable to the estate, and

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(s) R. S. C. 13th July, 1841, p. 14.

(t) R. S. C. 3rd February, 1848, p. 131; S. D. 1848, 19th April, p. 342.

(u) S. D. 1847, 6th February, p. 44; S. D. 1848, 15th August, p. 766; 13th January, p. 12; Supra, p. 116.

(v) S. D. 1850, 14th March, p. 51; 30th March, p. 85; Supra, pp. 216, 229.

whether it was necessarily so contracted. The decree ought therefore to specify the object for which the debt was incurred, and whether there was any other fund out which the widow might have defrayed the expense without charging the estate.(*w*)

So where a debt(*x*) ostensibly contracted by A. alone, is alleged to have been contracted by him on behalf and by the authority of another person also.

The decree should be confined to the rights of the parties in that suit.

In directing what sum A. is to pay to B., in a suit, it is irregular to deduct the amount which B. has been decreed to pay to A. in another suit.(*y*)

In remote districts, where local customs, at variance with the ordinary law, prevail to so great an extent, that the Court does not make its usual presumption in favour of the ordinary law, care must be taken not to rest decrees upon general rules of law without ascertaining and recording that they are commonly recognized in the district.

Thus(*z*) where a man sued in Assam to recover the value of certain jewels given by him to a woman in contemplation of their intermarriage, after the receipt of which jewels she married another man, although the Court considered that according to the Hindoo law, such jewels, once given, become streedhone and are irreclaimable, yet a decree to this effect was held incomplete because it did not record, as a fact, that the general Hindoo law was recognised in Assam as governing such cases.

Decree must exactly define that which it awards.

The ordering part of the decree must be definite and capable of being carried into execution. Thus if it awards to the plaintiff that portion in the village which he held previous to a certain event, and the amount of that very portion is in dispute between the plaintiff and the defendant, the decree must go on to state the amount of the portion.(*a*)

(*w*) S. D. 1848, 13th April, p. 316; 12th September, p. 817; S. D. 1849, 13th March, p. 64; Supra, p. 211.

(*x*) S. D. 1849, 13th January, p. 17.

(*y*) S. D. 1849, 8th May, p. 139; Infra, Chap. XXVIII.

(*z*) S. D. 1848, 4th May, p. 410.

(*a*) S. D. 1848, 15th January, p. 16; S. D. 1850, 12th March, p. 43.

If the decree award merely the land described in the plaint, and the plaint does not define the boundaries, or in some way afford the means of readily and certainly defining them, the decree is erroneous and cannot be executed.(*b*) The decree itself ought to specify the land of which possession is to be given, so that it may be enforced without the necessity of reference to the plaint or to any other document.(*c*) It should not, upon any conjectural or hasty view, award to a party more than has been actually proved to belong to him.(*d*)

Not to direct any thing impossible.

The decree ought not to direct any thing illusory or impossible: thus if it be in evidence, as the result of local enquiry, that the lands sued for have been wholly washed away, it is absurd to direct, that the plaintiff shall recover such portion of them, as may, in the execution of the decree, be found in the possession of the defendant.(*e*)

A decree ought not to be passed if it be absolutely incapable of being enforced, as such a decree declaring a right to be summoned to marriages of members of a particular community, and to receive paun from them upon such occasions.(*f*)

Nor any thing requiring retrial of the same questions.

Where a right to *some* land has been established, but the site of the land has not been ascertained, the Judge ought not to pass a decree affirming the right to the land, but referring the party to a second suit to fix the boundary, or in any way reserving that question for subsequent determination.(*g*) The Court must ascertain and define that which it desires to award; or if this be impossible, it must not award possession of that which may have no existence. If the Judge is not satisfied with the investigation which has taken place, he must investigate further: all the important issues must be tried and disposed of before he parts with the case before him: and it is highly

(*b*) R. S. C. 28th March, 1848, p. 137; S. D. 1850, May 16th, p. 207; Supra, p. 121.

(*c*) Sel. Rep. 3rd July, 1841, v. 7, p. 41.

(*d*) S. D. 1850, 30th March, p. 86.

(*e*) S. D. 1849, 4th January, p. 1.

(*f*) S. D. 1850, 21st March, p. 64; See Supra, pp. 28, 36, 37; See Sel. Rep. 28th February 1837, v. 6, p. 152.

(*g*) Sel. Rep. 11th August, 1847, v. 7, p. 341; S. D. 1848, 31st May, p. 485.

erroneous to pronounce a decree which involves a retrial of the same question between the same parties.(*h*)

The decree ought not to direct an adjustment of accounts in execution, but the amount of balance ought to be ascertained in some of the modes already enumerated, before the decree is pronounced, and ought to be settled as a part of the decision in the suit, and this award should be embodied in the decree.(*i*)

It ought to define the extent of interest awarded.

Where a decree awards to a party any interest in lands, short of absolute ownership (as when it gives to a Hindoo widow possession of her lands,) it ought to define the extent of the interest awarded.(*j*)

It should state whether defendants are liable as trustees or personally.

The persons against whom a payment is awarded ought to be distinctly specified.(*k*) Where persons are sued as trustees or guardians, or take defence in those characters, and the Court gives judgment for the plaintiff,(*l*) the decree ought not merely to describe the defendants as trustees, but it ought to state particularly whether they are personally liable for the sum decreed, or whether they are only liable as trustees or guardians, and to the extent only of the trust funds possessed by them, for of course where the decree is against the trustee or guardian personally, he and his estate, and not the person or estate of those for whom he acts, can be taken in execution.(*m*)

It should specify the amount due from each.

Where a decree is passed against several defendants holding under distinct titles, the amount due by each defendant ought to be specified.(*n*)

What is requisite in decree for malikana against several.

Where a proprietor of the soil succeeds in establishing his demand of malikana against the rent-free holders of several villages(*o*) (being a per centage on the gross rent of each village) the defendants, not being joint sharers in the whole, but occupants of distinct villages or portions of villages, the Court

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(*h*) S. D. 1849, 29th March, p. 86.

(*i*) S. D. 1850, 17th April, p. 118. It would seem that this rule does not apply to mesne profit. Supra, p. 333. Infra, p. 335.

(*j*) Sel. Rep. 5th November, 1821, v. 3, p. 114.

(*k*) S. D. 1848, 16th December, p. 870.

(*l*) S. D. 1848, 2nd March, p. 130.

(*m*) R. S. C. 29th January, 1839, p. 16.

(*n*) Con. 849, 20th December, 1833.

(*o*) S. D. 1847, 5th January, p. 1.

should record distinctly, in the body of the decree, the mode in which the malikana for each village is determined, the period and the amount for which each defendant is responsible. It ought not to fix a gross sum as payable on all the villages and to charge the defendants indiscriminately with the payment.

Decree should ascertain the rights and liabilities of the defendants amongst themselves.

But if a man establish his right to dues from a certain estate in which all the defendants are sharers, the decree is against all the sharers, jointly and severally, and the estate is made expressly answerable. The defendants in such a case have the option of apportioning among themselves, according to their respective shares, the amount decreed to be paid, or of allowing the estate to be sold in satisfaction of the claim.(*p*)

Not to be grounded on extraneous matter.

If however one of the shareholders pays the whole amount to save the estate, he does so at his own risk, and can only claim from his co-sharers the amount due from each in proportion to his share; and this must be defined by the decree.

Court cannot decree in favour of a person not before it.

If A. claims property from B. and the Judge comes to the conclusion that C., a stranger to the suit, is better entitled than either of them to possess the property, still his duty is limited to the adjudication of the claims before him: and he must not adjudge the property to C. until C. has brought a direct suit against the parties in possession of it.(*q*)

A decree ought not to specify the mode in which it is to be executed.(*r*)

Judge's recorded decision is the original.

Where the vernacular translation of the Judge's decision is at variance with the decision itself as recorded in English, (or in the language of the Judge, whatever it may be,) the discrepancy must be corrected in accordance with the original.(*s*)

In cases relating to the Hindoo or Mahomedan law of inheritance, where the appearance of the heirs has been invited by a proclamation of the kind noticed above,(*t*) the Moonsiff

(*p*) S. D. 1847, 23rd August p. 467, See S. D. 1850, May 2nd, p. 168.

(*q*) S. D. 1849, 10th May, p. 112; Supra, p. 327.

(*r*) S. D. 1847, 5th January, p. 1.

(*s*) S. D. 1848, 22nd March, p. 218; Supra, p. 315; S. D. 1850, p. 171.

(*t*) Supra, p. 149.

is forbidden to pass a decree, "excepting the property be by the decree adjudged to all the claimants in the proportions to which they may be respectively entitled."

The inquiry to be made by the Moonsiff is limited to the rights of the claimants in the property sued for, and cannot extend to the entire estate of the deceased.(*u*)

SECTION III.

COSTS.

Losing party pays costs.

COSTS of suit are, as has been already stated,(*v*) to be awarded against the losing party: but the rule is subject to many modifications.

Costs are proportioned to amount of claim established.

If the decree shall be given against the defendant, and the whole of the money or property, which may be demanded by the plaintiff, shall be decreed to him, a sum equal to the whole of the fees of his pleader, (computed as mentioned below) shall be adjudged to the plaintiff, in addition to the other costs which may be awarded to him ; but if only a part of his claim is decreed to the plaintiff, a sum bearing the same proportion to the money or to the value of the thing decreed, as the fees bear to the demand stated in the plaint, is to be decreed and added to the costs, which may be awarded to the plaintiff.(*w*)

This principle applies to the computation of costs generally, as well as to the pleader's fees. Where a decree giving wasilat directs an inquiry and adjustment of the amount to be made in course of the execution of the decree, it ought to direct the costs to be paid eventually, only in proportion to the amount which may be found due upon such adjustment of mesne profits.(*x*)

(*u*) Con. 1300, Cal. C. 18th June, West. C. 9th July, 1841.

(*v*) Supra, pp. 315, 321. S. D. 1850, 26th March, p. 70.

(*w*) Reg. XXVII., 1814, Sec. 26, Cl. 1.

(*x*) S. D. 1849, p. 119. See pp. 330, 333, Supra.

Suit dismissed, plaintiff pays pleader's fee.

If the suit be dismissed, whether upon an investigation of the merits or otherwise, the plaintiff is charged with the fees of his own pleader and with those of the pleader of the defendant.(*y*)

Where defence is unnecessarily expensive.

Where there is only one real defendant, and the mere formal defendants have without necessity acted separately, though their defence is the same with that of the principal defendant, or where several defendants employ the same Vakeel, and he files separate answers for each, which answers are all the same in substance; only one set of costs ought to be given against the plaintiff if he is unsuccessful: nor ought he to be ordered to pay the costs of claimants or third parties with whom he had no concern, and who have unnecessarily come forward,(*z*) nor to pay for a copy of the decree for the heir of a party entitled to it when a copy had been previously given to the ancestor.(*a*)

If costs be awarded against the winning party, or be out of proportion to the sum decreed, the Court must record the reason.(*b*)

And where a defendant is declared not liable for any part of the sum demanded, it is highly improper to charge him with costs, upon a mere conjecture that he had himself a dispute with the plaintiff on a similar subject, and might probably have been concerned in doing him the injury complained of.(*c*) If the plaintiff has valued his claim too high, he and not the defendant must pay all the additional costs of the defence caused by this excessive valuation.(*d*)

Costs of person improperly made defendant.

Where a person is improperly made defendant in a suit with which he has no concern, or in which he ought not to be a party, but a witness, his costs must be paid by the plaintiff.(*e*)

(*y*) Reg. XXVII., 1814, Sec. 26.

(*z*) S. D. 1849, p. 334; 1st November, p. 418; Sel. Rep. 9th March, 1848, v. 7, p. 446.

(*a*) See Sec. 5 of this Chapter.

(*b*) Sel. Rep. 13th July, 1847, v. 9, p. 353; S. D. 1850, 30th March, p. 82; Ibid, p. 84.

(*c*) S. D. 1850, 26th March, p. 70.

(*d*) See S. D. 1850, 3rd January, p. 1.

(*e*) S. D. 1849, 10th December, p. 440.

Costs of Collector improperly made defendant.

Where a Collector has been illegally made a defendant in his official capacity, and has filed his answer through the Government Vakeel, the Court ought to nonsuit the plaintiff's claim with costs;(*f*) and it should proceed, as in all other cases, to order the payment of the Government Vakeel's fees in the first instance by the Collector on the part of the Government, leaving the Collector ultimately to recover the amount from the plaintiff in the usual manner.(*g*)

Of suit withdrawn before pleadings completed.

If a suit be withdrawn, or be dismissed on default without a determination upon the merits, before all the requisite pleadings have been filed in Court, the pleaders of the plaintiffs and defendants are entitled respectively to only one-fourth of the established fee which they would have received, had the suit been brought to a regular decision by the Court. If after all the requisite pleadings have been filed in Court, an order of nonsuit be made, or the suit(*h*) be withdrawn or dismissed on default, the pleaders are entitled to one-half the fees which they would have received, if judgment had been given in the cause. The fees in both of the abovementioned cases are charged to the plaintiff, together with all the admitted costs incurred by the defendant.(*i*)

Of suit compromised.

The same rule applies to cases adjusted by razeenamah, except that the fees of the pleaders and all other costs of the suit are to be paid by the parties in such manner and proportions as may have been agreed upon and inserted in the razeenamah.(*j*)

Discretionary power of Court.

If, however, in any instance the payment of the pleader's fees, according to the preceding rules, should not appear to be just and equitable, the Courts exercise their discretion in charging the fees of the pleaders to the parties respectively, in such proportions as may appear equitable and proper, upon consideration of all the circumstances of the case.(*k*)

(*f*) Reg. XI., 1822, Sec. 38.

(*g*) Con. 1192, West. C. 21st December, 1838, Cal. C. 18th January, 1839.

(*h*) S. D. 1849, 8th August, p. 334.

(*i*) Reg. XXVI., 1814, Sec. 31, Cl. 1.

(*j*) Ibid, Cl. 2; Supra, Chap. XXVI.

(*k*) Reg. XXVI., 1814, Sec. 31, Cl. 3.

Litigants may make any agreement they think fit, with their Vakeels, for the remuneration of the latter, and the performance of such agreements can only be enforced by regular suit.(*l*) But those who are ordered to pay costs have nothing to do with the arrangement which the successful party may have made with his pleader: and when costs are awarded to a party in any regular suit, decided on the merits, against another party,(*m*) the amount to be paid on account of fees of pleaders is calculated according to the rules following:—

Rules for assessing pleaders' fees as between party and party.

Up to rupees 5,000, five per cent.

In suits for money, effects, or personal property, or for land or other immovable property of any description, if the amount or value of the claim, estimated according to the provisions of Regulation X., 1829, shall not exceed five thousand Sicca rupees, the pleader's fees amount to five per cent.(*n*)

Rupees 5,000 to rupees 20,000, two per cent.

If the amount or value shall exceed five thousand rupees and shall not exceed twenty thousand Sicca rupees: on the first five thousand as above, and on the remainder, two per cent.(*o*)

Rupees 20,000 to rupees 50,000, one per cent.

If the amount or value shall exceed twenty thousand rupees, and shall not exceed fifty thousand rupees; on twenty thousand as above, and on the remainder, one per cent.

Rupees 50,000 to rupees 80,000, one half per cent.

If the amount or value shall exceed fifty thousand Sicca rupees, and shall not exceed eighty thousand rupees; on fifty thousand as above, and on the remainder, eight annas per hundred rupees, or one-half per cent.(*p*)

Above 80,000 rupees.

If the amount or value shall exceed eighty thousand rupees, the fee to the Vakeel shall be one thousand rupees, and shall in no instance exceed that sum, however great may be the value or amount of the suit in which such Vakeel may be employed.

In all the preceding calculations, where the amount or value may be in fractions of rupees, such fractions are to be rejected in computing the fees.(*q*)

(*l*) Supra, p. 108.

(*m*) Act I. 1846, Sec. 7; S. D. 1849, 8th August, p. 334.

(*n*) Reg. XXVII., 1814, Sec. 25, Cl. 1; Reg. X., 1829.

(*o*) Reg. XXVII., 1814, Sec. 25. Cl. 1.

(*p*) Ibid.

(*q*) Ibid, Cl. 2.

The parties in a suit are respectively permitted to entertain two or more pleaders, who shall either divide the authorized fee between them, in an equal, or in any other proportion, which may have been previously agreed upon between them and their constituent; or shall each be entitled to receive the full established fee;—as may be specified in the vakalutnamah; but all stipulations to this effect must be distinctly stated in the vakalutnamah, which is otherwise construed to entitle the whole of the Vakeels appointed by it to an equal division of the established fee, and no more.(*r*)

Party may entertain two Vakeels.

How the fees are apportioned.

If the party agrees to pay to each of the Vakeels employed by him the full amount of the authorized fee, the opposite party in the suit can in no case be required to make good more than the fee of one of those pleaders, or such part of that fee as may be adjudged against him by the Court. The fees of the other pleader are considered as a separate expense, to be defrayed exclusively by the party entertaining him, and for which he is not to be reimbursed in any case whatever.(*s*)

Only one fee payable by opposite party.

Where a Vakeel is employed by two defendants under separate vakalutnamahs, he is entitled to receive from each the full amount of fees prescribed by Section 25, Regulation XXVII., 1814, and where two separate Vakeels are employed by two defendants, they are each entitled to the full amount of fees, and the whole amount of fees so due is chargeable to the plaintiff on the dismission of his suit.(*t*)

Fees of Vakeel employed by two defendants.

If a pauper plaintiff succeed, the Court orders the defendant to pay the fees of the plaintiff's Vakeel, or such part of them as it shall think fit, and such fees ought to be calculated on the ordinary scale, since there is no reason why he who has resisted a just demand should pay a less sum for costs because the man whom he injured was poor.(*u*) The same principle applies where a pauper defendant succeeds.

Fees of pauper plaintiff.

(*r*) Reg. XXVII., 1814, Sec. 30, Cl. 1.

(*s*) Ibid, Cl. 3.

(*t*) Con. 500, 3rd April, 1829.

(*u*) Reg. XXVIII., 1814, Sec. 10, Cl. 1.

It must be observed that there are many inevitable expenses in litigation, besides the disbursements for stamps and Vakeel's fees; and it would be far more just if parties who are considered to be entitled to costs, were enabled to recover the whole of the costs which they have really been put to.

The Vakeel of a pauper plaintiff whose claim has been dismissed, is not entitled to receive any part of his fees from the defendant.(*v*)

How property of pauper is applied in payment of costs.

Where the suit of a pauper plaintiff has been dismissed with costs and his property (if any) sold in execution, the proceeds of the property are first to be applied in payment of the fees of the Vakeels on both sides, next (if there be any thing over) to the money due to Government for stamps, and the residue is to be applied at the discretion of the Judge, according to the circumstances of the case, in satisfying the costs awarded to the opposite party, and any costs (distinct from stamp dues,) which may have been incurred by Government.(*w*)

How pleader is changed during suit.

A party who is dissatisfied with the conduct of his pleader, may at any time before judgment withdraw the powers delegated to his pleader, and may appoint another. In such cases he presents a petition to the Court, notifying that he has withdrawn the management of the suit from his late pleader, and he files a new vakalutnamah in the name of the new pleader.

Previous act valid.

All acts done by the first pleader on the part of his client, previously to his dismissal, are held valid: on the conclusion of the suit, the Court exercises its discretion in awarding to the pleader first employed any portion of the authorized fee to which he may appear justly entitled on a consideration of the trouble which he may have undergone, and the other circumstances of the case.(*x*)

Fees of discharged pleader.

Course to be pursued where

If a pleader is unable to attend the Court in consequence of indisposition, or other sufficient reason, he notifies the circum-

(*v*) Con. 740, 7th December, 1832.

(*w*) Con. 621, 21st January, 1831; Con. 1258, Cal. C. 1st November, West. C. 6th December, 1839.

(*x*) Reg. XXVII., 1814, Sec. 12, Cl. 2.

stances in writing to the Court on unstamped paper, and the hearing of any cause in which he is employed is postponed to a future day, unless the party or his authorized agent commits the management of the cause to any other pleader of the Court, or unless the party himself is present and willing to plead the cause in person. If the management of the cause be entrusted to any other pleader of the Court, instead of filing a new vakalutnamah, it is sufficient for the party or his mooktar duly authorized to endorse on the original vakalutnamah, a declaration, that he has appointed some other Vakeel of the Court to conduct the cause, either permanently or during the absence of the pleader first appointed. On passing a decision in such cases, the Court directs the amount of the authorized fee to be divided between the two pleaders in such proportions as may furnish an equitable remuneration for the trouble which they may have respectively undergone.(*y*)

Pleader disabled.

Apportionment of fees.

Whenever a Vakeel attached to a Zillah Court dies, or is removed from office, or voluntarily resigns his situation, the Judge notifies the fact in a paper affixed in his own Cutcherry and in the Cutcherries of the Sudder Ameens and the Collector of the district. This paper contains a statement of the several depending cases, in which the Vakeel was employed, and it requires his clients to attend in person, or to appoint another Vakeel, within a reasonable period to be fixed by the Court, not being less than six weeks. In such instances, instead of filing a new vakalutnamah, it is sufficient for the party or his mooktar duly authorized to endorse on the original vakalutnamah a declaration that he has appointed some other Vakeel of the Court, in lieu of his late pleader.(*z*)

Course pursued on death or removal of pleader.

Proclamation of Judge.

If any party does not attend or appoint another Vakeel, within the period thus limited by the Judge, he is required to shew cause for the omission, and if sufficient cause be not assigned, the Court proceeds as in case of default.(*a*)

New pleader must be appointed.

(*y*) Reg. XXVII., 1814, Sec. 13.
(*z*) Reg. XXVII., 1814, Sec. 18, Cl. 1.
(*a*) Reg. XXVII, 1814, Sec. 18, Cl. 2.

The Courts are authorized to apply the principle of the preceding rules to cases, in which the decision of suits may be materially delayed by the protracted indisposition of a pleader, or by his continued inability to attend the Court from any other cause which may be expected to be permanent, or of considerable duration.(*b*)

Whenever a pleader originally entertained by a party may have commenced the pleadings and prosecution or defence of a suit, and from any cause not originating in the misconduct of such pleader, another pleader shall be employed in his stead, it is competent to the Court in which the suit is decided or terminated, to adjudge to the pleader so employed at the commencement of the suit (or if he be dead, to his heirs or legal representatives) such part of the established fee, as may appear to be an equitable remuneration for the trouble which he has undergone.(*c*)

The Regulations do not require the Zillah Judges to interfere in regard to the remuneration of their Vakeels by parties in the Moonsiff's Courts, further than to intimate that if a party choose to change his Vakeel, he is bound to remunerate the individual engaged in the second instance, as well as him who was entertained originally.(*d*)

SECTION IV.

PUNISHMENT OF FRIVOLOUS SUITS.

Penalty for groundless suit.

It has been enacted, that if any person shall commence a suit in any Zillah or City Court of Dewanny Adawlut, which shall appear to the Judge to be frivolous, vexatious, or groundless, he is not only to dismiss the suit, with such costs, as he may think it equitable to award against the plaintiff, but is to fine him in such amount as he may think proper,

(*b*) Reg. XXVII., 1814, Sec. 18, Cl. 4.

(*c*) Reg. XXVII., 1814, Sec. 18, Cl. 5.

(*d*) Con. 990, Cal. C. 11th December, 1835, West. C. 2nd January, 1836.

upon a consideration of the nature of the case, and the situation and circumstances in life of the offender, and is to commit him to close custody until he pays the fine.(*e*)

The Civil Courts are not competent to impose fines on Covenanted Officers of Government for official acts performed by them in the course of their duty, provided such acts be done by the express orders of superior authority.(*f*)

If a Covenanted Officer of Government institute a suit without the sanction of superior authority, and such suit be adjudged to be vexatious, the Court is competent to impose a fine upon him for so doing.(*g*)

A Covenanted Officer of Government instituting a suit with the sanction of a board or superior authority, which, by the regulations, he is bound to obey, is not liable to fine, although in the judgment of the Court, the suit be vexatious.(*h*)

A Court is not competent to impose a fine on the board or superior authority for directing a subordinate Officer to institute a suit which, in the judgment of the Court, is vexatious.(*i*)

Pauper imprisoned for groundless suit.

If a pauper shall not establish his claim, and the Court shall deem the claim to be unfounded, vexatious, or wilfully exaggerated, and the plaintiff shall not pay the amount of his own fees, and the fees and costs which may be awarded against him in favour of the opposite party, the Court is authorized to commit him to close custody without labour, for a period not exceding six months.(*j*) The place of confinement is the Civil or Dewanny jail, not the jail of the Criminal Court.(*k*)

Plaintiffs in such cases, are not confined at the instance of the defendant, but are punished by the Judge for what he

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(*e*) Reg. III., 1793, Sec. 12, Benares; Reg. VII., 1795, Sec. 7, Ced. and Conq. Prov.; Reg. II., 1803, Sec. 9; Con. 1096, Cal. and West. C. 7th July, 1837; Sel Rep. v. 2, p. 162; S. D. 1847, p. 455; S. D. 1848, p. 429; Reg. XXIII., 1814, Secs. 40, 73.

(*f*) Cir. Ord. Cal. and West. C. 25th January, 1833, para. 1.

(*g*) Ibid, para. 2.

(*h*) Ibid, para. 3.

(*i*) Ibid, para. 4.

(*j*) Reg. XXVIII., 1814, Sec. 11, Cl. 1.

(*k*) Con. 57, 9th January, 1810.

deems an offence against the state, and any requisite subsistence for them, during their imprisonment, is provided by Government.(*l*)

Women of rank, who are exempted from personal appearance in Court, are not liable to confinement as litigious paupers.(*m*)

The order of confinement is carried into immediate execution, and is not suspended in consequence of the plaintiff's being desirous of appealing from the judgment; the plaintiff, however, is at any time entitled to his discharge on his paying into Court the full amount of the costs and expenses recorded against him in the decree.(*n*)

No remedy is provided in case the decision of the Judge be reversed on appeal.(*o*)

Proceedings against sureties of absconding pauper suitor against whom costs adjudged.

If the pauper plaintiff absconds and his sureties do not produce him before the Court, so that the order for his imprisonment cannot be carried into effect, the sureties are called upon to make good the full amount of the costs adjudged against the plaintiff. If they refuse or fail to do so, the Court may commit them to close custody without labour, in the Civil jail for a period not exceeding six months; they are of course entitled to their discharge on payment of the costs.(*p*)

The amount of costs due from the principal cannot be levied on the goods of the surety.(*q*)

The confinement of a pauper plaintiff, or of his sureties, does not preclude the Court from realizing the costs and expenses, to which he may be declared liable by the decree; but whether those costs be due to the defendant or to Govern-

(*l*) Con. 9, 13th September, 1805.

(*m*) Con. 11, 26th September, 1805.

(*n*) Reg. XXVIII., 1814, Sec. 11, Cl. 2.

(*o*) Con. 12, of 18th October, 1805, which bears reference to Reg. XLVI., 1793, Sec. 3, (since repealed) which awarded only three months' imprisonment, declares that "a further imprisonment may be ordered in the event of litigious appeal." This construction appears to have gone much beyond the enactment itself.

(*p*) Reg. XXVIII., 1814, Sec. 11, Cl. 3.

(*q*) Con. 922, West. C. 19th December, 1834, Cal. C. 26th January, 1835.

ment, the Court will endeavour to realize the amount by the sale of any property which may belong to the plaintiff, either at the time of the decree or subsequently thereto.(r)

SECTION V.

DECREES.—COPIES FURNISHED TO THE PARTIES.

Judge within 10 days tenders a copy of the decree to the parties.

THE Zillah Judge, either at the time of making the decree, or on a subsequent day, (of which the Court is to give notice to the parties or their Vakeels) within ten days after passing the decree, ought to deliver or tender in open Court, to each party, or to their Vakeels, a true copy of the decree, duly authenticated, with an endorsement made upon it of the date on which the copies may be delivered; and an entry of the delivery or tender, with its date, is inserted in the margin of the record opposite to the decree.

Proceeding if parties do not attend to take copy.

If either of the parties, or their Vakeels, is not present at the time when the decree is passed and the copy tendered, or fails, after notice, to attend on the subsequent day which may be fixed for the delivery of the copies, or refuses to take the copy of the decree when tendered, the copy is deposited amongst the records of the Court, and the cause of the non-delivery of it to the party is noted upon it, and also in the margin of the record.(s)

Decree to be ready for transcription within 10 days.

Every decree and final order ought to be prepared and ready for transcription within ten days after it is passed.(t)

Parties requiring copy to furnish stamp.

For the purpose of obtaining an authenticated copy of the decree, the party desiring it furnishes to the Court one, two or more sheets or rolls of the stamped paper prescribed in

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(r) Reg. XXVIII., 1814, Sec. 11, Cl. 4.

(s) Reg. IV., 1793, Sec. 26, Benares; Reg. VIII., 1795, Sec. 2, Ced. and Conq. Prov.; Reg. III., 1803, Sec. 27.

(t) Cir. Ord. Cal. and West. C. 20th September, 1839, para. 8.

Regulation X., 1829, as may be necessary for transcribing the decree.(*u*)

When such stamped paper is furnished, the Sherishtadar or other principal Officer, authorized by the Court, endorses on it a memorandum shewing when and on whose account, and in what suit it has been furnished, and grants a corresponding receipt for it on unstamped paper; the copy is then prepared, authenticated, and delivered or tendered within a month from the date of the paper being supplied: if there be any delay, an explanation of its cause must be added to the endorsement.(*v*)

In calculating the period allowed for appeals, whether regular, summary, or special, the interval which may elapse between the date on which a party furnishes the prescribed stamped paper in the Zillah Court, and that on which the copy of the decree is tendered or delivered to him, ought to be deducted.(*w*)

The whole of the stamped paper required for the copy of a decree, should be given in at once; but if only a portion has been given before the preparation of the decree, the entire quantity required must be made up by the time the decree is ready to be transcribed; and in calculating the time for appeal no deduction is allowed for any delay after that period, in completing the quantity of paper.(*x*)

The decree writer of the Court is to certify on the back of each decree, as soon as it is ready for transcription, the date on which it was ready, and the fact of his having notified to the party what quantity of additional paper may be needed for engrossing the same; procuring at the same time, a written acknowledgment of such intimation on the back of the original decree by the party or his Vakeel. Should neither the party nor his Vakeel be in attendance, the decree writer is to report to the Judge, who will record the fact, (after ascertaining its correctness,) for future reference.(*y*)

(*u*) Reg. XXVI., 1814, Sec. 8, Cl. 8; Reg. X., 1829.

(*v*) Reg. XXVI., 1814, Cl. 9; Cir. Ord. Cal. and West. C. 18th May, 1832.

(*w*) Con. 413, 3rd March, 1826.

(*x*) Cir. Ord. 8th May, 1840, para. 1.

(*y*) Ibid, para. 2.

From the date of this certificate, or from the date of the Judge's order recording the absence of the party and of any person on his behalf, until the date of filing such additional stamp, no allowance will be made in calculating the period of appeal; and if, in transcribing the copy of the decree, it should be found that a further supply of paper is required, the same principle is to be followed in that case also.(*z*)

Particulars to be inserted on the back of the decree.

When the original decree has been prepared, the date of its being completed and ready for transcription, the date of notice thereof being given to the parties or their representatives, the date of first delivery of stamped paper, whether in whole or in part, for a copy of the decree, the date of delivery of additional sheets after the preparation of the decree, and notice given to the parties or their representatives, with the number of sheets, and the date of the copy being ready, and of its being tendered or delivered to the parties or their representatives, are entered on the back of the decree, not only in figures but in words at length, and not only on the copies delivered to the parties, but on the original decree, which is intended to be kept with the record of the case.(*a*)

Copies of papers for records or official use not stamped.

Copies of proceedings and orders, accounts, statements, or other papers made for records of Court, or for transmission to other Courts, or public offices, are written on unstamped paper, except in cases in which it may be otherwise specially provided by the Regulations.(*b*)

The stamp laws are not intended to preclude individuals from making for their private use, and at their own expense, copies of judicial papers, with the permission of the Court or public Officer having charge thereof, on any paper, which they may prefer; but if such copies be not made on stamped paper, they cannot be authenticated by the seal or signature of any Court, or public Officer, and cannot be received as

(*z*) Cir. Ord. 8th May, 1840, para. 3.

(*a*) Cir. Ord. 12th February, 1847, para. 13.

(*b*) Reg. XXVI., 1814, Sec. 16, Cl. 3.

evidence in any Court of Justice or in any public Office whatever.(*c*)

The uncovenanted Judges are required to prepare and tender to the parties, within a week from the date of passing, copies of each decree or final order which they may pass.(*d*)

(*c*) Reg. XXVI., 1814, Sec. 16, Cl. 4.

(*d*) Cir. Ord. Cal. and West. C. 20th September, 1839.

CHAPTER XXVIII.

EXECUTION OF DECREES.

SECTION I.

HOW AND IN WHAT CASES AN ORDER FOR EXECUTION MAY BE OBTAINED.

Petition for execution.

A PARTY who desires to obtain the execution of a decree, (to whatever nation or class his adversary may belong),(*e*) appears either in person or by Vakeel before the Court which pronounced the decree, and presents a petition, praying that it may be carried into execution. The petition must be written on paper of the kind prescribed for the Court by which the decree may have been passed; viz., in the Moonsiff's Court on plain paper; in the Court of the Sudder Ameen, Principal Sudder Ameen, or Zillah Judge on an eight anna stamp. Even a pauper decreeholder must use this stamp.(*f*)

Stamp.

What the petition must contain.

The petition must set forth the number of the suit, the names of the parties, the date and substance of the decree; it must state whether any appeal has been preferred or admitted from the decision, and whether any and what adjustment of the matter in dispute has been made between the parties subsequently to the decree. It further contains a statement of the specific amount due to the petitioner under the decree, whether on account of costs of suit or otherwise; and the name of the individual or individuals against whom the enforcement of the decree is solicited.

(*e*) Con. 786, 3rd May, 1833.

(*f*) Reg. XXVI., 1814; Reg. X., 1829; Cir. Ord., 22nd April, 1842.

Tabular statement.

Each petition for execution must be headed with a Tabular Statement, according to the form, and containing the particulars following.(*g*)

Tabular form to be given at the head of every petition suing out execution of a decree.

1	2	3	4	5	6	7*	8
Number of the suit.	Names of the parties.	Date of the decree.	Subject of decree, that is, thing decreed.	Appeal preferred or admitted from the decision.	Any and what adjustment of the matter in dispute since the decree.	Statement of the specific amount due to the petitioner under the decree.	Name of the individual against whom the enforcement of the decree is asked.
1	Seetaram, plaintiff, appellant, *v.* Ramshee, &c. defendants, respondents.	1st January 1841.	Possession of Mouzah Ramnuggur, &c. with mesne profits, or rupees 2,000, principal and interest.	Not appealed.	No adjustment	3,200 rupees.	Ramshee *v.* Pershadee Loll, &c.

* At the foot of the petition, the different items of which the specific amount entered in column 7 is composed, whether on account of principal, interest, costs of suit, mesne profits, or otherwise, shall be given in detail, with a specification of the dates from and to which interest and mesne profits may be claimed; in short all such particulars as may elucidate the amount of the claim, and, in the event of any objections being taken to such amount by the opposite party, may tend to bring the matter in dispute to a distinct issue, with a view to its speedy determination.

Person applying for execution files certificate of jumma.

Whenever a decreeholder applies for the sale, in execution, of an estate paying revenue to Government or of any portion of it, he must at the same time file an authenticated extract from the register of the Collector's office, specifying the jumma of the estate.(*h*)

Where execution is prayed against person.

When the decreeholder moves for the issue of process of arrest against the person of the opposite party, he mentions in the body of the petition the residence of such party, and where

(*g*) Reg. XXVI., 1814, Cl. 5; Reg. X., 1829; Cir. Ord., 22nd April, 1842.

(*h*) Act. IV., 1846, Sec. 4.

the process of arrest is to be issued. When he moves for the sale of property, a schedule of the property, shewing where it is to be found, must be given at the foot of the statement, as well as the boundaries of any house, garden or tract of land included in the schedule.

Where prayed against property.

If the petition be not framed according to these rules, no order can be made upon it.

If the suit was tried *exparte*, or if an interval of more than one year has elapsed between the date of the decree, and the application; or if the enforcement of it be solicited against individuals, being heirs or representatives of the original parties in the suit, or against one only of several individuals who are equally affected by the decree; or if there be reason to believe that the matter in dispute has been adjusted by the parties subsequently to the decree, either by the voluntary surrender of the thing adjudged, or by the payment of the sum decreed, either in whole or in part, by kistbundy or otherwise; the Court does not proceed to the immediate enforcement of the decree, but issues a notice to the party against whom it is sought to be enforced, requiring him to shew cause within a limited period, why it should not be executed against him. If upon such notice he does not attend in person or by Vakeel, or does not shew sufficient cause, why the decree should not be forthwith executed, an order of execution passes against him in the usual manner. If he does shew cause, the Court makes such order as may appear just under the circumstances.(*i*)

Where summons to shew cause will be issued.

If, for instance, he denies that he is liable to make good the engagements of the person against whom the original decree was pronounced, and if the validity of this defence depends upon complicated facts which can only be properly investigated in a regular suit, it seems reasonable that the applicant should be desired to enforce his claim in a regular suit.

(*i*) Reg. XXVI., 1814, Sec. 15; Reg. VII., 1825, Sec. 7.

The notice to shew cause runs in the following form.(*j*)

Notice of Execution for service on defendant, against whom decree may be passed exparte.

In the Court of

plaintiff, *versus*

and son and heir of

of in defendants.

To and of

in

Take notice, that an *exparte* decree was passed against you on the 7th day of August, 1839, in favour of

plaintiff, by the of

for the sum of Company's rupees forty-five, three annas, and six gundahs, including costs and interest to the 7th May, 1841.

You are therefore required, agreeably to Clause 8, Section 15, Regulation XXVI., 1814, to acknowledge the receipt of this notice, and further to attend in person or by Vakeel on or before the 5th day of August, 1841, and shew sufficient cause to the satisfaction of the Court why the said decree should not be executed against you.

Given under my hand, and the seal of this Court, this 9th day of July 1841.

L. S. A. B. *Judge*, or &c.

The notice given to a mortgagor in a foreclosure suit, is as follows:(*k*)

In the Court of

To of in

Whereas of has, in a petition, dated the , of which a copy is hereunto annexed, applied to this Court, for foreclosing the mortgage and rendering conclusive the sale of certain landed property situate in this zillah, agreeably to the provisions of the deed of mortgage and conditional sale which he holds, you are hereby required to take notice that if you shall not, in the manner provided for

(*j*) Cir. Ord. 24th December, 1841.

(*k*) Ibid.

by Section 7, Regulation XVII., 1806, and within one year from the date of this notice, redeem the property mortgaged to the aforesaid , the mortgage and the conditional sale will become conclusive.

Given under my hand, and the seal of this Court, this 15th day of April, 1846.

L. S. A. B., *Judge*, or &c.

Application after 1 and before 12 years from decision.

A decree not carried into execution at the time of its being passed, or within a year from that time, may be executed on application being made for that purpose, within twelve years from its date, after the opposite party has been called upon to shew cause why it should not be carried into effect.

After 12 years the delay must be accounted for.

If the application be not made within twelve years, it cannot be entertained, unless the applicant satisfies the Court that there has been good and sufficient cause for the delay.(*l*)

What will excuse delay.

This rule appears(*m*) to have been laid down by analogy to the twelve years' rule of limitation; and delay will be considered to be satisfactorily accounted for, if the applicant can prove that he had demanded the money or matter in question, and that the defendant had admitted the truth of the demand, or promised to pay the money, or that he directly preferred his claim within that period for the matters in dispute, to a Court of competent jurisdiction to try the demand; and shall assign satisfactory reasons to the Court why he did not proceed in the suit; or shall prove that either from minority, or other good and sufficient cause, he had been precluded from obtaining redress.(*n*)

Government on the same footing as private applicant.

The extended period of sixty years given to the Government for the prosecution of its claims, has reference only to the hearing, trying, and determining of those claims, and not to the enforcement of rights already determined; and if the Government applies for execution after the lapse of twelve years, it

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(*l*) Con. 136, 28th October, 1813.

(*m*) Con. 3, 8th April, 1802; Sel. Rep. 16th November, 1818, v. 2, p. 280; R. S. C. 9th April, 1839, p. 9.

(*n*) See Supra, p. 52.

must, like a private individual, account satisfactorily for the delay which has occurred.(o)

No institution fee on this application.

A petition to enforce a decree, presented after an interval of several years, is not subject to the institution fee, as on a new suit; for the proceedings on such petition are not with a view to try the merits of the cause, but to determine on the enforcement of the decree.(p)

Where a fresh suit is necessary.

If the liability of the persons, or the property, against which a decree is required to be enforced, be doubtful, it seems that the decreeholder must institute a fresh suit, in which their liability is the point in issue and the decree is the cause of action.

If a decreeholder applies for execution in the usual way, and suffers twelve years to elapse without taking proceedings to enforce that application, the law of limitation will be applied to any fresh suit which he may institute after the twelve years to obtain execution of his decree.(q)

Decree not to be twice executed.

If the decree has once been fully executed by putting the decreeholder in possession of the property awarded to him, and he has subsequently been turned out of possession, it cannot be executed again, but a fresh suit must be instituted in respect of the dispossession as a new cause of action.(r)

If however a party is put in possession of land awarded to him by a decree, or sold to him under a decree, and is ejected so soon after that, the act may fairly be regarded as amounting to resistance of the Court's process, the Court may interfere summarily to restore possession.(s)

Execution granted.

In the absence of any circumstances, either in respect of the time of the application or otherwise, which make it necessary to call upon the opposite party to shew cause, the Court after causing the petition to be compared with the decree

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(o) Con. 1348, West. C. 1st, Cal. C. 22nd July, 1842.

(p) Resolution of Sudder Dewanny Adawlut, 9th August, 1797; Sel. Rep. 5th March, 1811, v. 1, pp. 317, 319.

(q) S. D. 1849, 5th July, p. 269.

(r) Sel. Rep. 6th November, 1818, v. 2, p. 280.

(s) R. S. C. 19th August, 1835, p. 9.

contained in the original record of the suit, proceeds to execute the decree.(*t*)

The Court must at this stage of the cause assume that the decree is right; and it cannot admit, as an objection to execution, any plea which might have been urged against passing the decree.(*u*)

Application referred to Principal Sudder Ameen.

Applications to a Zillah Judge for the enforcement of decrees may be referred by him to his Principal Sudder Ameen for execution.(*v*)

Execution by delivery of the thing decreed.

If the decree awards a zemindary, an independent or dependent talook, or other real property, it is executed by causing the party against whom the decree has been pronounced to deliver the property, if he be in possession of it, to the party to whom it may have been decreed. If it be for personal property, or for a sum of money, it is carried into effect by causing the specific thing or the value of it to be delivered; or the sum of money is levied by selling at public auction, a sufficient portion, or (if necessary,) the whole of the lands, houses and other effects, real or personal, belonging to the debtor; or by the attachment of his person; or, if necessary, both by sale and by attachment, for which purpose the Court has power to issue process simultaneously against his property and his person;(*w*) although, in the absence of special circumstances, the process ought to be executed in the first place upon the property of him from whom the amount is due, and upon the property of his surety, if he has given security,(*x*) and not upon the person of the debtor.

Levy by public sale.

By atachment of person.

By sale and attachment.

Execution may be awarded against debtors jointly and severally, if the decree is against them jointly and severally: and if an application be made by the decreeholder for execution against them severally in specific shares, and be disallow-

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(*t*) Reg. XXVI., 1814, Sec. 15, Cl. 7.

(*u*) Sel. Rep. 19th August, 1816, v. 2, p. 194.

(*v*) Act V., 1836.

(*w*) Reg. IV., 1793, Sec. 7, Benares; Reg. VIII., 1795, Sec. 2, Ced. and Conq. Prov.; Reg. III., 1803, Sec. 9; R. S. C. 5th July, 1847, p. 106.

(*x*) Con. 21, 25th July, 1806; Supra, p. 164.

ed, he may proceed against them jointly and severally as before. (y)

Execution against Government.

The costs and damages which Government may be decreed to pay, are defrayed out of the public funds.(z)

It is not the practice, however, to attach money in any of the public treasuries by process of Court, in execution of decrees against the Government; but the Court, by precept, directs the Collector or other public Officer who may have conducted the suit on the part of the Government, to comply with the decree.

If the Collector omit or refuse to obey any order or decree of Court, it is the duty of the Court, from which the process may have issued, to fine him according to the nature of the offence. If he refuse or omit to pay the fine, the Court is to report the circumstance to the Governor General in Council who, if he approves of the fine, will order it to be deducted from the salary of the Collector. No fine ought to be imposed where the Collector is not guilty of wilful disobedience, but objects, under instructions from the Government, to the immediate execution of the decree. If in the end, and after the right of appeal (if it exist) has been made available, the decree still holds good against the Government, the Governor General will direct it to be carried into effect.(a)

Execution against persons connected with the manufacture of Salt.

It has been specially enacted that if a decree be passed against a Native Officer, or any person under engagements on account of the salt manufacture, and actually employed in it, and if the Court shall order the decree to be enforced at any time between the commencement of Kartick and the end of Assar, recourse may be had to his property, but his person shall not be attached or molested during that period. At the close, however, of the manufacturing season, the Agent shall be responsible for his appearing before the Court, if required; but the salt, or the advances, or any implements belonging to

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(y) R. S. C. 18th January 1848, p. 125; Supra, pp. 333, 334.

(z) Reg. III., 1793, Sec. 11.

(a) Cir. Ord., 16th April, 1818.

the East India Company, which may be in his hands, shall not be liable for the decree. But during Sawun, Bhadoon and Assin, and also in the manufacturing season, if the Salt Agent shall signify to the Judge, through an authorized Vakeel of the Court, that their attendance is not required in the business of the manufacture, the persons of the individuals so employed, shall no longer be exempt from execution process.(*b*)

If a decree be passed against an Officer of a salt chowkey, and the Court orders the decree to be enforced, recourse may be had to his property; but his person, if attached, must not be removed without previous notice being given to the party under whose superintendence the Officer acts, in order that another person may be immediately deputed to take charge of his place during his absence.(*c*)

Foreign judgment not executed.

The Courts will not decree execution of a foreign judgment, as such.

A foreign judgment is, generally speaking, considered as a *primâ facie* ground of action in the Civil Courts of the East India Company, and a party who wishes to enforce such a judgment within any district subject to the jurisdiction of those Courts, must institute an action founded thereon, in the proper Court of the district: and the decree which he may obtain, is executed as a decree of that Court.(*d*)

The judgment of a Court, acting under the authority of any foreign state, such as the Court at Chandernagore; or the judgment of a Court in Great Britain, or even of a Court of Civil Judicature in the Saugor and Nerbudda territories, to which the Civil Regulations of the British Government have not been extended, is upon the same footing in this respect as a foreign judgment.(*e*)

The merits of a foreign decree, or at least the circumstances under which it has been obtained, and its obligations on the

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(*b*) Reg. X., 1819, Sec. 22.

(*c*) Ibid, Sec. 29; Supra, pp. 154, 268.

(*d*) Supra, p. 26.

(*e*) Con. 1133, Cal. and West. C. 16th February, 1838; R. S. C. 16th December, 1842, p. 41.

parties, are in some degree open to examination in the Courts of the East India Company.(*f*)

They do not, however, examine the judgments of Her Majesty's Supreme Court., but hold them to be conclusive as to the rights of the parties, and to afford, when sued upon, sufficient ground for a similar adjudication.(*g*)

Execution of decree of Mofussil Court in Calcutta.

Writs for the sale of property situated in Calcutta, are forwarded for endorsement by a Judge of the Supreme Court, and are executed by the Sheriff, in like manner, as if the writ had been issued by that Court,(*h*) to which alone he is responsible for the due execution thereof; and in order to facilitate such execution, the Judge of the Supreme Court, who may endorse the process, is invested by Act XXIII., 1840, with certain powers as to its correction and as to other particulars. The Sheriff proceeds in the regular course to seize the right and title of the defendants in execution, in any property pointed out to him on the part of the plaintiffs. That right and title may be none at all, or may be qualified or subject to mortgage, prior seizures, or the like. As the Sheriff seizes and sells at his own peril, or refuses at his own peril to do so (by return of *nulla bona*, &c.,) he, in practice, calls upon the parties requiring upon him to seize, or pointing out the property, to indemnify him, whenever a third party claims an interest; and if both parties offer indemnity, he may, at his own peril, elect which indemnity he thinks the best, and either sell or release accordingly, being liable in damages to the opposite party, if the latter shall make out his case to be the true one.(*i*) The Mofussil Judges ought to avoid interference with this process, and to leave it to the parties interested to give the needful directions and information to the Sheriff, which of course they must do at their own charge and risk.

The writ of execution is in the following form. Where the property to be seized is in Calcutta, the writ is directed to the

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(*f*) Supra, p. 262.

(*g*) Supra, pp. 36, 46, 49.

(*h*) Cir. Ord. 15th July, 1842.

(*i*) Ibid. And see Civil Guide, p. 266.

Sheriff; where it is elsewhere, the writ is directed to the Nazir of the Court.

WRIT OF EXECUTION AGAINST THE EFFECTS.

To the Nazir of the Court of Dewanny Adawlut for the Zillah of Hooghly.

Whereas Cossinath was directed by a decree of this Court under date the 15th June, 1841, to pay to Mahomud Ally the sum of rupees 5,000, with interest at twelve per cent. per annum to the day of payment, which to this date amounts to rupees 33-5-8, and 500 rupees for costs of suit, amounting to Company's rupees 5,533-5-8, and whereas the said Cossinath having had notice of this decree, has omitted to liquidate the same; these are therefore to command you, to levy the said sum of Company's rupees 5,533-5-8, and the sum of 100 rupees for the costs of executing the process, by distress and sale of the lands, goods and chattels of the said Cossinath, and you are hereby ordered and directed to distrain the lands, goods and chattels of the said Cossinath, and to sell and dispose of the same, within
(not less than thirty days,) unless the sum of Company's rupees 5,533-5-8, for which such distress shall be made, together with the reasonable charges of taking and keeping such distress, shall be sooner paid, and you are hereby commanded to certify to me what you shall do by virtue of this warrant.

Given under my hand and the seal of the Court, at Hooghly, the 20th day of June 1841.(*j*)

L. S. N. B. *Judge.*

If a defendant against whom judgment has been given by any Court of the Zillah of the Twenty-four Pergunnahs, shall retire before its execution into the jurisdiction of the Calcutta Court of Small Causes, that Court, upon receiving a written application from the Judge of the zillah setting forth the circumstances, and accompanied by a copy of the decree

(*j*) Cir. Ord. 1st March, 1841.

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duly authenticated, proceeds to execute the said decree as it executes its own judgments, and on payment of the like costs as are demanded for the execution of such judgments.

But the Court of Small Causes cannot execute any decree, unless the cause of action, in respect of which the decree was obtained, were such as the Court would have held cognizance of, if it had occurred within their local jurisdiction.(*k*)

Execution of the decree of the Calcutta Court of Small Causes in the Twenty-four Pergunnahs.

If a defendant, European or Native, against whom judgment has been given by the Court of Small Causes for the town of Calcutta, shall retire before its execution, into the jurisdiction of the Judge of the Zillah of the Twenty-four Pergunnahs, that Officer upon receiving a written application from the plaintiff, either in person or by Vakeel, setting forth these circumstances, and accompanied by a copy of the judgment duly authenticated, proceeds to execute the judgment as he executes his own decree.(*l*)

If indeed the defendant shall allege any cause against the execution which shall appear to require the determination of the Court of Small Causes, the Judge (taking security, if necessary, for the satisfaction of the judgment) allows him a reasonable time to apply to that Court, upon the expiration of which, execution issues, unless the defendant produces an order to the contrary from the Court of Small Causes.(*m*)

No defendant who has been confined by the Court of Small Causes, and liberated under the rules of that Court in consequence of having received diet money for a given period, can again be confined by the Judge of the Twenty-four Pergunnahs in execution of the same judgment; but in all such cases, execution proceeds against his property only.(*n*)

The execution must be according to the terms of the decree, when specific; and not according to the terms of the documents upon which it is founded, nor can the execution extend to that for which the decree does not provide.

(*k*) Act XXVII., 1839.

(*l*) Reg. XVI., 1812, Sec. 2, Cl. 1; Con. 32, 6th February, 1835.

(*m*) Reg. XVI., 1812, Sec. 2, Cl. 2.

(*n*) Ibid, Cl. 2.

Where costs have not been awarded by the decree, the Court, even where it considers the omission to have been made through mistake, cannot order execution for costs without first correcting the decree on the motion of the decree-holder.(*o*)

So, possession must be given according to the boundaries laid down in the decree, although a subsequent survey may have shewn them to be inaccurate.

If the decree mention only the name of the village and the quantity of land, without specifying the boundaries, and if the plaint be equally indefinite, no execution can be had, but a review of judgment must be applied for.(*p*)

Execution not carried beyond the terms of the decree.

A decree is considered to be executed when its terms have been actually fulfilled: there can be no execution of articles which are merely inferrible from the decree. Thus, if the plaintiff has obtained a decree declaring his right to claim the performance of certain ceremonies by the members of his family, and awarding damages for the past omission to perform them, this decree can only be enforced with respect to the damages actually awarded, and the costs of the suit; and a new action must be brought in respect of any subsequent refusal to perform the ceremonies.(*q*)

Where part only of the property claimed is awarded by a judgment, possession of the residue cannot be given in execution of that judgment, although it has in the meantime descended to the claimant by a perfectly clear title.(*r*)

And where the rights and interests of a putneedar are sold in execution, only that which was actually held by him in putnee, and which was in his possession, will pass to the purchaser, and the latter cannot claim lakhiraj land situated within the putnee talook, but held by a grant prior to the putnee.(*s*)

(*o*) R. S C. 5th July, 1847, p. 107.

(*p*) R. S. C. 28th March, 1848, p. 137; Supra, pp. 331, 332.

(*q*) R. S. C. 5th January, 1842, p. 21; Supra, p. 332.

(*r*) Sel. R. 29th March, 1830, v. 5, p. 21.

(*s*) Sel. Rep. 28th January, 1840, v. 6, p. 281.

Exception.

Where, however, an act is clearly contrary to the principle and object, and spirit of a decree, the Court will in executing its decree prevent the commission of such act: where a thing is forbidden by the decree merely as instrumental to a wrongful end, any other act which tends to that end will be prohibited.

Thus where A. had erected an embankment by which the influx of water into certain property belonging to B. was prevented; and B. instituted a suit expressly to try the question of A.'s right to prevent such influx, and obtained and executed a decree for the removal of the embankment; and A. then erected another on a different spot, but which had the same effect of keeping the water out of the property of B.;—the Principal Sudder Ameen considered that as the decree had been literally fulfilled, he had no power to interfere with the second embankment: but the Sudder Dewany Adawlut declared that the mere removal of the former embankment was not sufficient to carry out the purposes of the decree, and that the erection of another by the defendant for the same purpose must be prevented.(*t*)

Court may give consequential directions.

But the Court may, in the execution of a decree, pass orders not adding to or varying the decree itself, but consequential upon it, and carrying into effect its intention in regard to profits, interest, or other matters in dispute between the parties to the suit, which may be involved in the decision already pronounced; and these cannot form the subject of a fresh action.(*u*)

It seems that an order passed in the execution of a decree, giving possession of particular lands under that decree, does not, under Construction 1129, bar a subsequent suit between the same parties for the same lands, if it can be distinctly made out to the satisfaction of the Court, that the land given in execution of the decree was altogether distinct and separate

(*t*) R. S. C. 2nd February, 1841, p. 2.

(*u*) Con. 1129, 9th February, 1838; Cir. Ord. Cal. and West. C. 11th January, 1839, para. 9.

from the land claimed in the former suit, and which the Court intended to award by the first decree.(*v*)

Satisfaction of decree by instalments.

The Courts cannot grant indulgence of time, in the satisfaction of a final judgment, when property, from which it can be satisfied (whether belonging to the judgment debtor, or to his sureties) may be forthcoming; unless the decreeholder consents to waive his right of immediate enforcement, under an engagement for gradual payment or otherwise; or unless a short postponement of the sale of property, shall, under any particular circumstances, appear just.(*w*)

But when no property is pointed out from which the judgment can be enforced, and the party against whom it is passed, or his surety, if he have given any, is willing to engage (under sufficient malzaminy or hazirzaminy security, as one or the other may be tendered or required) for the liquidation of the amount due, by instalments, within such period as the Court passing the final decree or entrusted with the execution of it shall deem reasonable, it is competent to the Court, by which the final judgment is given, or to a Zillah Court enforcing the decision of a native Commissioner, and to any superior Court, revising the proceedings of an inferior Court, to accept the engagement so offered and to cause execution of the decree in conformity therewith, so long as the conditions of it shall be duly fulfilled.(*x*)

This may be done whether the debtor has been arrested or not.(*y*)

If the defendant fails to fulfil his engagement, whether it be an engagement prescribed by the Court, or one resting upon the consent of his creditor, an order will be granted, on application, for the sale of the property which has been charged with satisfaction of the decree.(*z*)

Co-sharer born after decree.

A minor born after decree passed, even although the property adjudged be of such a nature that he is entitled to share

(*v*) S. D. 1848, 26th January, p. 29; 26th April, p. 371.

(*w*) Reg. II., 1806, Sec. 10.

(*x*) Ibid.

(*y*) Con. 1196, Cal. and West. C. 26th August, 1836, para. 2.

(*z*) S. D. 1847, 12th August, p. 432.

it with those in whose favour the decree was pronounced, cannot be summarily admitted to the benefit of the decree, but must institute a separate suit for that purpose.(*a*)

Decree cannot be executed against a stranger.

Summary execution of a decree will not hold, beyond the right of the party against whom it may have been passed, and those claiming under him: for instance, A. cannot be ousted from his land in execution of a decree passed in favour of B. in a suit instituted by B. against C. to which suit A. was not a party.(*b*)

Where executed against representative of defendant.

Nor will execution be ordered against property in the possession of the representative of the defendant, without a regular suit, except in the very clearest cases.

When a decreeholder seeks to execute his decree against property to which he considers the debtor to be entitled, but which is in the possession of third parties, a regular suit must be instituted to enforce the sale of such property.(*c*)

Execution irrespective of liabilities among co-defendants.

The holder of a decree against two defendants is entitled to enforce his decree, although they may be litigating, as between themselves, their liabilities under the decree.(*d*)

A debtor declared by a decree jointly responsible with others for a specific sum, cannot claim exemption from further liability on depositing what he alleges to be his share of the debt.(*e*)

Court directs the order in which decree is to be executed against several parties.

The Court, ordering execution against several defendants who are not all liable in the same degree, will direct the order in which the decree or decrees shall be executed against them. Thus where a plaintiff obtained a decree against A., and his estate proving insufficient, the plaintiff brought an action and obtained a decree against the sureties who had bound themselves for A's performance of the final judgment, and against the heirs of the Nazir, who had falsely reported those sureties to be sufficient when in fact they were not so: the Court directed that the execution should proceed first against the

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(*a*) R. S. C. 30th December, 1834, p. 3.

(*b*) Con. 744, 21st December, 1832.

(*c*) S. D. 1848, 15th April, p. 320.

(*d*) R. S. C. 18th January, 1842, p. 23.

(*e*) R. S. C. 6th April, 1841, p. 5; 23rd August, 1841, p. 15.

principal in the original decree, then against the sureties, and then against the heirs of the nazir only in the event of failure to recover the amount from the principal and the sureties.(*f*)

Execution in favour of assignee of decree.

A decreeholder may assign to a third party, by endorsement or otherwise, the benefit of the decree passed in his favour.(*g*)

The Court will recognize this transfer in those cases only, where the original decreeholder shall certify in person or by mooktar appointed for that special purpose, either verbally or by petition, that he has made the transfer. The name of the transferree is then inserted in place of that of the original decreeholder in the execution of decree process.

It passes subject to all its incidents.

The transferree however takes the decree subject to all its incidents.

Thus where A.(*h*) brought an action against B., but was nonsuited and ordered to pay costs; and afterwards A. obtained a decree against B. in another case; but before A. applied for execution, B. assigned to a third party the benefit of the order against A. for costs. It was held that A. might nevertheless set off an equivalent portion of the amount due to him on the second decree, against the amount due by him on the first. The assignment in this case was manifestly an act of collusion with a view to defraud the plaintiff.

Defendant may sue out execution.

After decree, a defendant may sue out execution, if the plaintiffs or those standing in their right neglect to do it. For then the rights of the parties are ascertained, and plaintiffs and defendants are equally entitled to the benefit of the decree.

The proceeding adopted for this purpose merely substantiates the suit, and brings before the Court the parties necessary to see to the execution of the decree and to be the objects of its operation. It does not deal with the claims made by the several parties in the original pleadings, except in so far as they

(*f*) R. S. C. 14th April, 1841, p. 5.

(*g*) Con. 1341, West. C. 20th May, Cal. C. 17th June, 1842.

(*h*) R. S. C. 27th October, 1846, p. 86.

Further suit to regulate execution.

remain undecided. Sometimes from the neglect of parties or some other cause it becomes impossible to carry a decree into execution without the further decree of the Court. This happens generally in cases where the parties having neglected to proceed upon the decree, their rights under it become so embarrassed by a variety of subsequent events, that it is necessary to have the decree of the Court to settle and ascertain them.

The Court in these cases in general only enforces and does not vary the decree.

Default of decreeholder.

Applications for the execution of decrees are to be considered as disposed of when the decree has been completely executed, or the case ordered to be struck off the file and placed in the record office in consequence of the failure of the decreeholder to take proper measures for the enforcement of the award passed in his favour.(*i*)

Whenever the decreeholder fails for a period of six weeks to carry on the execution of his decree, or when the whole of the property pointed out by him has been either sold and the proceeds paid to the party entitled to receive the same, or released from attachment, in consequence of other claimants proving their right thereto, the case should be struck off the file. In the event of a fresh application being made by the decreeholder, the case will again be brought on the file as a new or revived case of execution, and will bear the date of its re-admission, and not of its original institution, the length of time it may remain on the file being calculated accordingly.(*j*)

It is to be observed that six weeks is the maximum period, on the expiration of which, in the event of neglect in prosecution, or default of any description on the part of a decreeholder, it is obligatory upon the Judge to remove the case from his file; but the case may be immediately expunged, if the Court think fit, on the omission of the decreeholder to attend to its requisitions within a specific and stated space of

(*i*) Cir. Ord. Cal. C. 7th West. C. 21st December, 1838.

(*j*) Ibid.

time, if the Court has fixed a certain time for compliance. It is not, however, desirable that the Court should too rigidly prescribe fixed periods for every process in the course of execution.(*h*)

Where decree-holder must give security.

The decreeholder cannot in any case, without giving security, obtain execution of a decree, whether for movable or for immovable property, within the period allowed for appeal, or while an appeal is pending.(*l*)

SECTION II.

WHAT KINDS OF PROPERTY MAY BE TAKEN IN EXECUTION.

What property cannot be taken in execution.

Wuqf.

Tombs.

Term of worship.

Military pay.

Pension.

It is not legal to attach or to sell in execution of a decree, for a private debt, property dedicated as wuqf;(*m*) or land belonging to a Mahomedan, which, though not so dedicated, is actually occupied by tombs;(*n*) or the profits of the term of worship of a Brahmin officiating at a temple, which profits are received not for the Brahmin's private use, but for the purposes of the worship,(*o*) or the pay of a sepoy,(*p*) the salary of a Military Officer,(*q*) or a pension granted by Government for past service.(*r*)

How salary of public servant may be made available.

Any sum of money which has accrued due to a public servant (not military) on account of salary, and which is actually in the office to which he belongs, is liable to attachment: which is effected by a requisition addressed by the Judge to the head of the office.

It is only by a compromise between the parties and an agreement on the part of the public servant that his salary shall be applied to this purpose, that the salary can be made

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(*h*) Cir. Ord. 14th October, 1843.

(*l*) C. O. 11th January, 1850; C. O. 28th September, 1850.

(*m*) Con. 1166, West. C. 20th July, Cal. C. 17th August, 1838.

(*n*) Sel. Rep. 30th July, 1831, v. 5, p. 136; R. S. C. 21st November, 1842, p. 40.

(*o*) R. S. C. 19th May, 1841, p. 10.

(*p*) Con. 1175, West. C. 31st August, Cal. C. 27th September, 1838.

(*q*) Con. 902, West. C. 26th September, Cal. C. 24th October, 1834.

(*r*) Con. 788, 3rd May, 1833; R. S. C. 6th April, 1839, p. 19.

permanently available towards satisfying the decree. Such compromise must be carried out by the parties concerned, and not by the process of the Court.(s)

Crops belonging to chowkeedars.

Crops grown on lands allotted to village chowkeedars for their maintenance are liable to be sold in execution of a decree.(t) And so are implements of agriculture; although the latter are protected from sale for arrears of rent or revenue.(u)

Implements of husbandry.

Not against property of debtor in possession of his assignee under Insolvent Act.

Where, after a decree has passed against a party, but before execution, he is adjudicated insolvent under the Act for the Relief of Insolvent Debtors, the decree cannot be executed against his property in the possession of the assignee appointed by the Insolvent Court.(v)

A mere decree made before the adjudication of insolvency will not authorize the complainant to seize the property of the insolvent; but he must prove his debt in common with other creditors. But if the property has actually been sold in execution of the decree, before the adjudication of insolvency, the party who has executed the decree is entitled to the payment of his debt out of the proceeds.(w)

Lands in custody of Supreme Court by Sheriff or Receiver.

Lands which the Supreme Court has attached through the Sheriff of Calcutta,(x) or of which it has assumed the management by appointing a Receiver, cannot be meddled with while in that custody.

The position of the latter Officer closely resembles that of the manager whom the Civil Courts sometimes cause to be appointed, for property which has been attached to secure the eventual execution of a decree. Lands thus attached by the Civil Courts, even where no manager has been appointed, are, as has been already stated, protected from sale by the Sheriff.(y)

(s) Con. 827, 9th August, 1833; Cir. Ord. 20th January, 1843.

(t) Con. 1212, West. C. 19th April, Cal. C. 12th July, 1839.

(u) Con. 962, West. C. 26th June, Cal. C. 31st July, 1835.

(v) R. S. C. 4th April, 1836, p. 10; See Cir. Ord, Cal. C. 25th August, West. C. 30th October, 1837.

(w) Cir. Ord. Cal. C. 25th August, West. C. 30th October, 1837.

(x) Supra, pp. 46, 47.

(y) Supra, pp. 166, 167.

A receiver is an indifferent person, between the parties, appointed by the Supreme Court, to receive the rents, issues and profits of the lands, or other property in question in a cause, where it does not seem reasonable to the Court that either party should do it. This charge is commonly, though not in all cases, imposed upon an Officer who is known as the receiver of the Court. The receiver, whether he be the ordinary receiver of the Court, or a private individual, is an Officer of the Court, and acts under its direction. His possession is that of the Court, and any attempt to disturb it without the leave of the Court first obtained, is treated as a contempt of Court. But any person who conceives himself prejudiced by the receiver's possession, may obtain leave from the Court to contest its validity, though not a party to the suit.

Lands already attached by the Government.

Lands attached by order of the executive authorities for offences against the state, are not liable to be sold in execution of decrees of the Civil Courts, or for the realization of fines or otherwise, while they are so held under attachment.(*z*)

In such cases, however, the Government makes such arrangement as may be fair and equitable for the satisfaction of the decrees of the Civil Courts.(*a*)

And the protection does not extend to lands attached through the Collector, by the Magistrate's orders, for évasion of criminal process.(*b*)

Almost every interest in property is available to the decree-holder in execution.(*c*)

Mortgaged property.

Mortgaged property may be sold in execution of a decree, with a reservation of the rights and interests of the mortgagee.(*d*)

Where the right and interest of a defendant in certain property had been sold, and it turned out that he had no right or interest at all, the purchase-money was returned by order of Court.

(*z*) Reg. III., 1818, Sec. 10, Cl. 2.

(*a*) Ibid, Cl. 3.

(*b*) R. S. C. 22nd February, 1848.

(*c*) See above, p. 166.

(*d*) Con. 856, 24th January, 1834.

If A. be in possession of land, subject only to a right in B. to pay A. a specific sum of money and thereupon to take over the land, the proper order to pass in the execution of a decree against A. is, that the right and interest of A. in the property, be sold: and, it is erroneous to order the sale of his contingent interest in the sum of money which B. may hereafter pay. The purchaser of A.'s right and interest will, as a matter of course, be entitled to the money when B. comes to pay it.(*e*)

Deposit on revenue sale in hands of Collector for refund.

A forfeited deposit on a revenue sale, which the Government has ordered to be refunded to the party who made the deposit, may be attached(*f*) in the hands of the Collector by the Civil Court in execution of a decree; and the Collector is not afterwards at liberty to apply it even to the discharge of the Government revenue due on estates belonging to the party to whom the refund was ordered to be made.

Judgment obtained by debtor against a third party.

So the surplus proceeds of an estate sold for arrears of revenue, may be attached in the hands of the Collector, and if the Collector has any objection to urge to the order of attachment, he ought to obey it, but to appeal to the Sudder Dewanny Adawlut. The Commissioner of Revenue has no jurisdiction whatever in such a case.(*g*)

If A. obtain judgment against B., who has no property of his own from which it can be satisfied, and if B. has obtained or afterwards obtains judgment against a third party, A. is entitled to an attachment of the property receivable by B. from the third party.(*h*)

Claims of debtors against third party.

The plaintiff may sell, in execution, the claims which the defendant may have against third parties, whether they be claims under a judgment actually passed in his favour, or claims not yet established.(*i*)

(*e*) R. S. C. 8th July, 1844, p. 59.
(*f*) R. S. C. 11th July, 1843, p. 51.
(*g*) R. S. C. 18th April, 1842, p. 28.
(*h*) Con. 293, 9th July, 1818, para. 3.
(*i*) Con. 1248, West. C. 6th September, 1839, Cal. C. 3rd January, 1840; 2 Sev. R. 191.

Land which has been adjudged to a party by a decree of Court may be taken in execution, although it has in the interval been resumed and assessed, for that process is not intended to affect the proprietary right.(*j*)

Resumption and assessment no bar to execution.

So, if, after a decree awarding possession of land, the land be sold for revenue, and the defendant obtain a reversal of the sale, the decreeholder may still obtain possession under his decree.(*k*)

Nor revenue sale when reversed.

If a plaintiff has obtained a money decree against a defendant, the right and interest of the defendant in any landed property may be sold in execution, although a suit may have been instituted by a third party to recover the land from the defendant; such sale does not affect the interests of the third party.(*l*)

Land of defendant in respect of which another suit is pending.

If a decree be pronounced against a Hindoo widow personally, execution will not be summarily ordered, after her death, against the estate of her husband in possession of a son adopted by her with her husband's permission: the decreeholder must bring a regular suit to establish the liability of the property, on the ground of the debt having been incurred to protect it from sale, or for other sufficient cause.(*m*)

Decree against widow not executed against her husband's estate after her death.

SECTION III.

OF ATTACHMENT IN EXECUTION.

WHERE property has been already attached, it is the duty of the Judge, upon the decision of the suit, to pass such order relative to the property attached as may be just and conformable with the judgment given in the cause. If the decree be against the defendant, all right and interest possessed by him in the property attached (saving arrears of rent or revenue

Where the property is already under attachment.

(*j*) R. S. C. 5th April, 1847, p.

(*k*) Con. 999, Cal. C. 8th January, West. C. 5th February, 1836.

(*l*) R. S. C. 14th April, 1841, p. 6.

(*m*) R. S. C. 26th May, 1841, p. 10; R. S. C. 16th July, 1849; Bengali Gazette, 21st August, 1849.

due from land, and any other *bonâ fide* claims which may be entitled to satisfaction in preference to the decree) are held answerable for the execution of the judgment. But if the plaintiff's claim be dismissed, or be not in any considerable proportion established against the defendant, all expense and loss to the defendant, which may arise from the attachment of his property in consequence of such claim, shall be reimbursed to him by the plaintiff as part of the costs of suit.(*n*)

Where no property has been attached before decree, it is usual to apply for attachment as soon after decree as possible, in order that the debtor may be prevented from parting with it, and that it may be retained to secure the gradual liquidation of his debt, or that the remains may be forthwith realized by its sale.(*o*)

Where security is taken or property attached after decree to ensure execution.

If it be shewn by satisfactory evidence, that the party against whom the decree was passed, or (in the event of his decease,) his legal representative who may have become answerable for the fulfilment of it, is about to remove or dispose of the property from which the judgment ought to be satisfied, the Court is authorized to require security in such amount as may appear sufficient for making good the decree; and in the event of such security not being given, to cause an attachment of property, as provided for in similar cases, whilst a suit is depending.(*p*)

If the Sheriff of Calcutta seize land in execution of a judgment of the Supreme Court, and afterwards sell the land, not having quitted possession between the seizure and the sale, the purchaser has a good title against a party claiming by virtue of the execution process of a Mofussil Court, whose decree was prior in date to that of the Supreme Court, but the attachment not made until after the Sheriff's seizure.(*q*)

(*n*) Reg. II., 1806, Sec. 5, Cl. 3.

(*o*) Supra, p. 363.

(*p*) Reg. VII., 1825, Sec. 7; See Reg. II., 1806, Sec. 5; Supra, pp. 164, 170; See Con. 1236, West. C. 19th July, Cal. C. 16th August, 1839.

(*q*) S. D. 1849, September 10th, p. 385; Supra, p. 368.

Alienation *pendente lite* is valid.

Alienations of property by a man against whom a suit is pending are valid, unless process of attachment has previously issued in the usual form.(*r*)

After judgment and till attachment.

After judgment has been given against a party generally, and not for specific property, he retains his power to dispose of his property until the decreeholder induces the Court to depute an officer to attach the property of the debtor; and the power of disposal is revived if the officer so deputed does not remain in possession :—and the power of disposal is not determined(*s*) by the mere fact that the property has been included in a list given in by the decreeholder, with a view to its being lotted for public sale in execution of a decree; the private sale, if made honestly and in good faith, is valid; and it cannot under any circumstances be summarily set side; but such sales are viewed with jealousy by the Courts, and will be set aside if they appear to be fictitious and not real sales, or to have been effected with a fraudulent view to avoid the execution of the decree.(*t*)

But if alienation be made of property after it has been actually proclaimed for sale in execution of a decree, the alienation is void.(*u*)

Property attached by consent to satisfy judgment.

The Judge is competent, with the consent of the parties, but not without such consent, instead of selling the estate of the debtor in satisfaction of the debt, to cause it to be attached until the amount due, be realized from the proceeds;(*v*) such attachment must be made through the Collector in those cases where the land, if sold, would be sold by the Collector.(*w*)

(*r*) Supra, pp. 165, 167; Reg. II., 1806; S. D. 1848, 26th June, p. 591.

(*s*) Set. Rep. 27th March, 1844, v. 7, p. 157; S. D. 1850, 30th January, p. 9.

(*t*) S. D. 1847, 30th August, p. 483; Con. 588, 8th April, 1831, para. 4.

(*u*) S. D. 1848, 26th June, p. 591; S. D. 1849, 13th June, p. 202; See S. D. A. Sel. Rep. 8th January, 1844, v. 7, p. 147; Ibid, 17th February, 1845, v. 7, p. 191.

(*v*) Con. 752, West. C. 21st December, 1832, Cal. C. 1st February, 1833.

(*w*) R. S. C. 27th September, 1842, p. 39.

SECTION IV.

DELIVERY OF POSSESSION AND JUDICIAL SALE.

Delivery of possession and judicial sales effected by Ameens.

THE delivery of formal possession of lands, houses or other real property, the attachment and the sale of property in execution of decrees, or orders of Court, or for realizing fines, are usually effected through the agency of the Ameens, whose appointment and some of whose duties have been already noticed.(*x*)

Their remuneration for delivery.

For the delivery of possession, they are remunerated according to the scale mentioned above.(*y*)

Where real or personal property has to be attached and sold in realization of sums awarded by the Courts, the agency of the Ameen is restricted to the attachment and sale, and he is not competent to issue the advertisement of sale, or to receive upon his own authority, any objections to the sale.(*z*)

Their commission on sales.

For this duty, the Ameens are entitled to receive a commission of one anna in the rupee on the proceeds of sales effected by them.

Remuneration where property is not all forthcoming.

It may happen, however,—first, that no part, or only a very small portion of the property included in the Schedule filed by the decreeholder, and ordered to be attached through the Ameen, may, after due search and enquiry, be forthcoming:— or, secondly, that after attachment, but before the day of sale, the party liable for the demand may discharge the same, or may compromise the matter with the decreeholder, and the latter may file a "razeenamah;" or that the sale may be postponed and eventually stopped by order of the Court, or that from some other cause it may not take place: —or, thirdly, that the Ameen may actually have proceeded, on the day fixed for sale, to the spot, and the sale may not

Where demand discharged or compromised before day of sale.

Where sale stopped on the day fixed.

(*x*) Supra, pp. 291, 295; Cir. Ord. 31st December, 1841.

(*y*) Ibid.

(*z*) Ibid, para. 8.

take place owing to payment of the amount, or other cause: —or, fourthly, that the sale having taken place, may afterwards be reversed for some cause not involving the conduct of the Ameen.(*a*)

Where sale is afterwards reversed.

In any of the first three contingencies, the Ameen is paid at the rate of daily allowance, already mentioned; viz., twelve annas for himself and three annas for the hire of peons, the number of days being calculated according to the distance, on a fixed scale of ten miles per diem. Every day of detention at the place of attachment or sale, which may be compulsory, and beyond the control of the Ameen, is charged for in addition, at the same rates, and one day's remuneration is paid to the Ameen on the occurrence of the second contingency, should the sale have been stopped in time enough to prevent him from leaving his usual abode, for the purpose of effecting the sale.(*b*)

How the Ameen is paid in these cases.

Detention at place of sale.

The commission on the proceeds of sale can of course only be levied on completion of the sale, but the Ameen is under all circumstances entitled to the remuneration above stated.

Whenever, therefore, an application is presented for the attachment and sale of property in execution of a decree, the decreeholder is required to deposit in Court the amount of compensation, to which the Ameen will be entitled, and the Ameen will not be deputed, until such sum have been paid in; if the sale be carried out to completion, the decreeholder is allowed credit for the amount thus prepaid, in calculating the demand to which he would be liable for, the commission of one anna in the rupee on sale proceeds.(*c*)

Decreeholder must deposit Ameen's allowance.

Deposit credited in calculating commission.

The total amount receivable by the Ameen can in no case exceed the amount he would have received if the sale had been effected in due course.(*d*)

Amount not to exceed commission on sale.

Where the sale takes place, but is afterwards set aside for some cause not connected with the conduct of the Ameen, he

Where sale is reversed Ameen receives

(*a*) Cir. Ord. 31st December, 1841, para. 9.

(*b*) Ibid, para. 10.

(*c*) Cir. Ord. 31st December, 1841, para. 3.

(*d*) Ibid, para. 11.

full commission.

receives the full commission of one anna in the rupee on the proceeds of the sale.

By whom the Ameen's allowance is alternately paid.

The Court ordering the sale will in such case determine which of the parties shall ultimately pay the costs incurred on this account, as well as those which arise when the sale is stayed by an order of Court. When the decreeholder files a razeenamah, he must make good the allowance of the Ameen, and in any compromise concluded with the opposite party he must make his arrangement for obtaining reimbursement of the amount; but when the sale is stayed owing to the payment into Court, or to the Ameen, of the demand by the opposite party, such payment must include the Ameen's allowance calculated under whichever of the foregoing rules may apply to the case, and the Ameen must be paid before any payment is made to the decreeholder.(*e*)

Pay of Ameen when delivery of possession has been resisted.

The delivery, to auction purchasers, of possession of property sold by Ameens, is considered as included in the duty, for the performance of which the Ameen receives the commission of one anna in the rupee on the sale proceeds; but where the delivery of possession is unduly resisted, it will form a separate case, and the Court will specially fix the remuneration within the limits prescribed.(*f*)

Employment of extra Ameens.

In giving possession of lands, so extensive as to render it impossible for one Ameen to complete the duty within a moderate period, the Court may appoint one or more assistants on separate allowances, not exceeding those of the Ameen.

It cannot, however appoint an Ameen to give possession with a larger allowance than twelve annas a day, however extensive the lands may be, and however important the duty.(*g*)

Who is responsible for custody of property attached.

No person can be compelled to take charge of property attached in execution of a decree, but any one who does take charge of it, becomes responsible for its safe custody and

(*e*) Cir. Ord. 31st December, 1841, para. 12.

(*f*) Ibid, para. 13.

(*g*) Con. 1337, Cal. C. 13th May, West. C. 3rd June, 1842.

liable to a regular suit for damages, if he fail to keep it safe.(*h*)

The person at whose instance the property is attached, is generally considered answerable for its safe custody during the period of attachment.(*i*)

Where the Court deputes an Officer.

In directing the attachment of land or other real property in execution of a decree, the Civil Courts exercise a discretion as to deputing a chuprassy or other Officer to remain in charge of it. In adopting or omitting this precaution, they have regard to the value and peculiar circumstances of the property, and to the wish of the party at whose instance the property is attached, or of his Vakeel. The attachment is in truth of little value unless an Officer continues in possession.(*j*)

Aid of Collector in enforcing decrees relating to land.

The Civil Judges may require the aid of the local Collector in the enforcement of all decrees, affecting the proprietary right to, or the possession of, any lands whether paying revenue or exempt from revenue, whenever it may appear conducive to the speedy and complete execution of such decrees; whether by giving possession to the parties entitled thereto; or by the adjustment of a wasilat account or otherwise,(*k*) and it is desirable that this agency should be resorted to upon all fitting occasions.(*l*)

Consequence of default made before Collector.

If a case of this sort be pending before the Collector, and the decreeholder fail to comply with any requisition, which must be obeyed before his decree can be executed, such as the order to advance the Ameen's fees; the Collector may strike the case off his file and give intimation to the Judge of his having done so. The Judge on receipt of such intimation

(*h*) Con. 958, West. C. 19th June, Cal. C. 17th July, 1845, para. 2.

(*i*) Ibid, para. 3; see Chap. XVI.

(*j*) Cir. Ord. Cal. and West. C. 5th September, 1834, para. 2, Supra pp. 372, 373.

(*k*) Reg. VII., 1825, Sec. 6, Cir. Ord. West. C.

(*l*) Cir. Ord. West. C 30th September 1836, Cal. C. 6th January, 1837, para. 2; Cir. Ord. 12th December, 1834, para. 4; Cir. Ord. Cal. C. 7th, West. C. 21st December, 1838, Cir. Ord. 8th November, 1844.

may adopt a similar course, and leave the decreeholder to institute new proceedings at his discretion.(*m*)

Expense of partition.

Whenever a Civil Court awards to any person the proprietary right in a portion of an estate paying revenue to Government (whether fractional or consisting of specific lands) and issues a precept to the Collector requiring him to divide the estate, and (provided it be not held khas or let in farm by Government) to put the parties in possession of the shares, to which they may be entitled, under the decree; the Court directs at the same time that those who have withheld the right so decreed, shall defray the whole of the expense which may be incurred in the subsequent process of dividing, separating and giving possession of, and apportioning the public revenue on the portion of the estate or lands so decreed. But if any special reason shall appear for a deviation from this general rule, the Court is at liberty to direct these expenses to be defrayed by all or any of the parties to the decree, in such proportions as it may deem just. Copies of all orders which the Courts may pass on this subject, are transmitted to the Collector for his guidance, together with the precept.(*n*)

The butwarah or partition of an estate, which is partly the property of Government and partly of private individuals, must nevertheless be made by the revenue authorities, and cannot be made by an Ameen appointed by the Court.(*o*)

Punishment of Ameen acting corruptly.

If the Ameen be guilty of corruption, he is liable to prosecution before the Magistrate for a criminal misdemeanor, at the instance of the Collector, through the Vakeel of Government. And he is also liable to a suit for the same offence in the Civil Court of the zillah, and is, on conviction, compelled to restore the money or property corruptly taken, to the party from whom it may have been received, with all costs to the party prosecuting; and he is imprisoned until the amount of

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(*m*) Cir. Ord. 16th June, 1843.

(*n*) Reg. XIX., 1814, Sec. 5.

(*o*) R. S. C. 11th March, 1844, p. 57.

the decree be made good by him personally, or be levied by the sale of his property.(*p*)

Where the property is situated in another jurisdiction.

Where the Court is of opinion that an application for the sale of property lying in another jurisdiction, ought to be complied with, it transfers the application to the Judge of the district, in which the property is situated. The whole of the proceedings consequent thereon, as well as any incidental investigation and the inquiry into every claim that may be preferred, are conducted by that Officer, as they would have been conducted by the Court issuing the process, had the property been situated within its own jurisdiction.(*q*)

The rule is applicable to all sales, whether made with or without the intervention of the revenue authorities,(*r*) to movable and immovable property,(*s*) to the subordinate as well as to the Zillah Courts.(*t*)

In such cases the Principal Sudder Ameens and Sudder Ameens forward the applications, with a proceeding under their seal and signature, to the Judge of the Zillah Court within whose jurisdiction the property lies; the Moonsiffs send it through the channel and under the signature of the Judge of their own district.(*u*)

How pleaders' fees and costs due to Government are recovered.

These rules do not apply to the recovery of any fees or costs which may be due to Government, or any fees due to Vakeels by a party in a suit. In such cases, as well as in suits, in which a party may have been allowed to plead *in formâ pauperis*, it is the duty of the Court to proceed, without any application from the parties, to enforce execution of the judgment so far as relates to the recovery of the amount of fees, or of costs due to Government, or to pleaders in the suit.(*v*)

(*p*) Reg. XIX., 1814; Ibid, Sec. 13, Cl. 2.

(*q*) Con. 1000; Cir. Ord. 8th May, 1840, para. 2; R. S. C. 1st February, 1842, p. 24.

(*r*) Ibid, para. 3.

(*s*) R. S. C. 13th September, 1842, p. 38.

(*t*) Cir. Ord. 24th September, 1841, para. 1.

(*u*) Ibid, para. 2.

(*v*) Reg. XXVI., 1814, Sec. 15, Cl. 9.

Moonsiffs are not at liberty to issue separate process for the realization of Vakeel's fees :(*w*) the realization of Vakeel's fees, as adjudged by Moonsiffs, forms part and parcel of the process of execution, except in cases wherein the claim may be dismissed, and the defendant may move the Court for the recovery of his costs.(*x*)

(*w*) Cir. Ord. 18th June, 1844, para. 1.

(*x*) Ibid. para. 2; Reg. XXIII., 1814, Sec. 15, Cl. 4; Reg. VII., 1832, Sec. 11.

CHAPTER XXIX.

EXECUTION OF DECREES.

SECTION I.

SALE.

Sale of personal property and smaller landed property.

WHEN personal property, or landed property consisting of houses, gardens, orchards or small portions of land held exempt from the public assessment are to be sold, in execution of decrees or other process, the sale is made by order of the Court or Officer empowered to enforce the decree or process, and without application to the revenue authorities.

Effected by Court.

Officers employed in selling.

Property of these different kinds is sold through the Ameens already mentioned, or the Nazirs of the Zillah or City Courts, or the Sudder Ameen at the station of the Judge, and the local Moonsiffs in other parts of his jurisdiction.(y)

Rules of sale.

Proclamation.

In all cases of attachment and intended sale, whether of personal or of landed property of the kind described, in execution of any decree, or other judicial process, a proclamation of the intended sale, with particulars of the time and place of sale of the property to be sold and of the amount due, for the recovery of which the sale is ordered, must be made, in the current language of the country, for at least thirty days before the appointed day of sale, exclusive of the day of sale, and the date on which the proclamation may be ordered: such proclamation is made by beat of drum, on the spot where the property is attached, and a written notification, to the same

(y) Reg. VII., 1825, Cls. 2 and 3, Con. 933, Cal. C. 20th February, West. C. 20th March, 1835.

effect, is also affixed in some conspicuous place, within the village or town, in which the attachment takes place; as well as in the cutcherry of the local Moonsiff, and at the cutcherries of the Collector of the district, and the Zillah Judge who may have ordered the sale. When the sale is to be made by a Sudder Ameen, the notification is also affixed in the cutcherry of such Sudder Ameen.(*z*)

It is quite essential to the validity of the sale, that these rules should have been observed; and the sale will be set aside if any of them has been disregarded.(*a*)

The usual processes for attachment and sale, in such cases, may either be issued successively or simultaneously, as the Judge, or other judicial Officer, directing the sale, may in each instance think proper, with reference to the circumstances of the case: but no sale ought in any instance to take place without a previous proclamation for the period above specified.(*b*)

If it turns out that the day fixed for the sale will be a holiday, such as the Ekadasee or 11th day of the new moon, the Court will, on application, postpone the sale.(*c*)

Claims and objections before sale.

Must be advanced within thirty days.

Who may offer.

How investigated.

Postponement of sale.

If, within the period fixed by the proclamation, any claim is preferred to the property thus advertised for sale, or any objection is offered to the proposed sale, either on the part of the defendant against whom the process of sale has issued, or of other individuals,(*d*) such claim, or objection is enquired into by the Judge, or other Officer, who may have ordered the sale; or it may be referred for enquiry and report to a Sudder Ameen or local Moonsiff, and, if necessary, the sale is postponed, till the investigation has been completed; but the claim must be preferred to the Judge, or Officer ordering the sale, as soon as practicable after the intention to sell is advertised,

(*z*) Reg. VII., 1825, Sec. 3, Cl. 2.

(*a*) Cir. Ord. 15th May, 1842; Sel. Rep. 5th October, 1841, v. 7, p. 48; Cir. Ord. 2nd August, 1843, para. 1; Civ. Guide, p. 740.

(*b*) Reg. VII., 1825, Sec. 3, Cl. 3.

(*c*) S. D. 1848, 24th February, p. 110.

(*d*) Con. 1844, West. C. 22nd November, Cal. C. 6th December, 1833.

and the sale will not be postponed if the claim appears to have been designedly and unnecessarily delayed with a view to obstruct the ends of justice. In such cases the claimant is left to prosecute his claim, after the sale, by a regular civil suit.(*e*)

No postponement where objection designedly delayed.

Judicial Officers are not at liberty, after the period fixed by the proclamation has expired,(*f*) to admit claims to property advertised for sale in execution of a decree.

Claims not to be received after thirty days.

All sales of property of whatever kind, in execution of a decree or other process of Court, are strictly in the nature of private transfers: they are not in the nature of public sales for revenue. They convey to the purchaser nothing beyond that which belonged, up to the moment of the sale, to the person whose interests are sold, and they confer no right or privilege which was not vested in that person. They give no warranty of title, and they only place the purchaser in the same position, with respect to the thing sold, in which they found the defendant.(*g*)

Judicial sales equivalent to private transfers.

Imply no warranty of title.

Even where the sale has taken place in execution of a decree, which adjudged payment of a loan previously advanced to protect the same property from public sale for arrears of revenue, it has not the same effect as such public sale would have had, in cancelling leases granted by the late proprietor.

As a sale in execution of a decree transfers to the purchaser only the rights and interests of the debtor, it does not affect or impair any *bonâ fide* leases during the period of the farming engagements concluded with the late proprietor.(*h*)

Sale does not avoid *bonâ fide* lease.

But it is otherwise where there has been any collusion or fraud in the contract of lease,(*i*) as if a beneficial lease has been granted in order virtually to defeat the sale, and the Court is authorized, after summary investigation of an objection to sale in execution, to quash any lease which may be

(*e*) Reg. VII., 1825, Sec. 3, Cl. 6.

(*f*) Cir. Ord. 11th July, 1847, para. 1.

(*g*) Reg. VII., 1825, Sec. 3, Cl. 7; Act IV., 1846, Sec. 10; Cir. Ord. 10th June, 1842, Rules 5 and 6.

(*h*) R. S. C. 30th June, 1841, p. 13.

(*i*) R. S. C. 26th April, 1841, p. 8.

satisfactorily shewn to be fraudulent, leaving the parties to establish it by regular suit.(*j*)

There is a general disposition to imagine that a judicial sale conveys some warranty of title, and the Officers who conduct such sales have therefore been enjoined(*k*) to make it distinctly known to the bidders and to all concerned, that the sale can only have the effect of putting the purchaser in the place of the defendant, that it does not affect the interests of strangers, and that no man can be ousted of his lands because the Court has, in a suit to which he was not a party, adjudged them to another,(*l*) or because they have been advertised for sale, in execution of a decree against another.(*m*)

Principles on which Courts deal with objections to sale.

The Courts, in dealing with objections raised before them to sales which may have been advertised, keep strictly in view the nature and consequences of judicial sale, and they proceed with the sale if they see that its consequences will not be injurious to the rights of the party objecting.

Partial claims do not stop sale.

If the objection be, that the property is already mortgaged to the objector, or, that the property is undivided and the objector is the owner of a share in it; the Judge(*n*) does not stop to investigate such claims, which can only be done in a regular suit, but he orders the sale to proceed; the defendant's right or interest being alone sold, subject to any prior mortgage, or to the claims of others to a share in the property.

Claims are recorded at sale.

The existence of such claims is made known, if time permit, to the bidders, by the Officer conducting the sale, and is recorded by him in the roobukaree of sale.

Claims to the whole property must be investigated.

Where the objection is founded upon an allegation, that the property put up for sale, does not belong to the person against whom execution has been taken out, but that it is the absolute property of the objector, such claims must be made the subject of a summary investigation, because on the result depends whether the contemplated sale shall take place at all or not.

(*j*) Con. 1059, 2nd December, 1836.
(*k*) Reg. VII., 1825, Sec. 3, Cl. 7.
(*l*) Con. 744, 21st December, 1832.
(*m*) Con. 10, 18th September, 1805.
(*n*) Cir. Ord. 4th September, 1840; Cir. Ord. 10th June, 1842, Rule 4.

Possession alone is regarded.

Possession is the sole point to be looked to and determined in this summary inquiry, and should it be established that the objector or claimant was in possession immediately before the attachment of the property or advertisement of sale, the sale is stopped, without inquiry into the validity of the alleged title, any dissatisfied party being left to bring a regular suit.(*o*)

It must be adverse.

But execution is not stayed, merely because the heir of a debtor, who died after judgment passed against him, was in possession of the estate of the deceased at the moment when execution was taken out against the estate; nor is it stayed on account of any thing short of an actual *bonâ fide* possession under a title adverse to the right of the debtor. The Courts act upon their discretion and decide upon the fact according to the evidence adduced, to whether the claim of the objector rested upon an actual or merely upon a pretended possession, upon possession in good faith or collusive possession.(*p*)

Interest of debtor may be sold though suit pending as to property.

Where property has been advertised for sale in execution of a decree, and a person who has unsuccessfully offered objections to the sale, proceeds to institute a regular suit for the property, this circumstance alone does not (in the absence of any special reason) bar the immediate sale of the right and interest of the judgment debtor, in the disputed property.(*q*)

Three months allowed for appeal.

Where claims to real property or objections to the sale of it are brought forward within the period of the proclamation, the sale is not carried into effect, till the expiration of three months, allowed for an appeal, which space is calculated from the date of the order of sale pronounced by the Judge on disallowing the objection; exclusive of the interval between the date on which the required stamped paper is furnished by the party to the Court, and that on which the copy of the order is tendered or delivered to the party requiring it.(*r*)

(*o*) Cir. Ord. 10th June, 1842, Rule 4.

(*p*) Cir. Ord. 21st May, 1847; R. S. C. 31st January, 1848, p. 128.

(*q*) R. S. C. 14th March, 1842, p. 24, but see S. D. 1847, 30th August, p. 483.

(*r*) Cir. Ord. Cal. and West. C. 19th July, 1833.

Only one such period allowed.

But the law does not allow a new postponement on the rejection of every petition objecting to the sale; only one postponement is allowed, and at the time of making the postponement the Court peremptorily fixes the sale for some convenient day, at the end of the three months allowed for appealing; so that if there is no appeal, the property may be sold without further delay,(s) and it is erroneous to postpone issuing the customary orders for the sale process until the term has expired.(t)

Day of sale fixed for the end of the period.

New proclamation before sale.

If a sale be postponed pending the investigation of a claim or objection within the period limited, it is proper that on such claim or objection being disallowed, another proclamation (the term of which should not be less than fifteen days) fixing the time and place of sale, with the other usual particulars, should be issued for the information of intending purchasers; but it is not competent to the Courts to receive new claims or objections to the sale, within the period of the second proclamation, or at any time after the expiry of thirty days from the date of the first. All subsequent claims or objections are regarded as having been designedly and unnecessarily delayed, and the claimants are left to prosecute their claims after the sale, by regular suit.(u)

But new objection not received.

Each objection to be separately recorded.

Every petition containing objections of the above nature, constitutes a separate case, and is separately recorded.(v)

Where an objection to the execution of a decree has been overruled, the objector is entitled to apply for a rehearing, and the Zillah Judge is not competent to fine him for such application, even where it appears frivolous and vexatious.(w)

Advertisement.

The "ishtihar" or notice that property is to be sold by an Ameen in execution of a decree, must contain the following conditions of sale.(x)

(s) Con. 877, 27th March, 1834.

(t) Con. 1027, West. C. 15th, Cal. C. 29th July, 1836, para. 2; Cir. Ord. 11th August, 1843, para. 2.

(u) Cir. Ord. 11th July, 1847, para. 2.

(v) Cir. Ord. Cal. C. 7th, West. C. 21st December, 1838.

(w) Con. 1138; R. S. C. 13th March, 1843, p. 46.

(x) Cir. Ord. 12th August, 1842, para. 1.

Conditions of sale—Deposit.

A deposit of ten per cent. on the price shall be required to be made at the time of sale by the purchaser, on whose failure to comply with this requirement, the property shall be forthwith put up again and sold.(*y*)

Time for payment of purchase-money, 1, of smaller landed property.

In sales of real property the full amount of the purchase money shall be made good by the purchaser within fifteen days from the day of sale, in default of which, the deposit will be forfeited, and the property be resold at the risk of the first purchaser, who shall forfeit all advantages, and make good all losses.(*z*)

2, of personal property.

The entire sum bid for movable property shall be paid up within twenty-four hours from the time of sale, and before delivery of the property, subject to the penalty provided in the preceding rule.(*a*)

Application of forfeited deposit.

The law further provided, up to the 14th June 1850, that in the event of a sale not becoming final, the amount of deposit forfeited should be carried to the credit of the owner of the property, for the benefit of the decreeholder, after deducting therefrom the commission of the Ameen on the sale;(*b*) but it will be seen below(*c*) that Act XXV., 1850, passed on the date just mentioned, has altered this rule so far as regards sales of land.

Remuneration of Officer conducting sale.

Nazirs employed in the attachment and sale of property are not entitled to receive any commission on the proceeds of sale, although it would seem that Moonsiffs, who are not (in the discharge of their ordinary functions) Ministerial Officers of the Courts, are like Ameens, entitled to such commission, when they are thus employed ministerially, but not when they sell in execution of decrees pronounced judicially by themselves.(*d*)

The bill of sale granted to auction purchasers of property sold in execution of decrees under Regulation VII., 1825, is

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(*y*) Cir. Ord. 12th August, 1842, para. 2.

(*z*) Ibid, para. 3.

(*a*) Ibid, para. 4.

(*b*) Ibid, para. 5.

(*c*) Infra, p. 389.

(*d*) Con. 509, 29th May, 1829; See above, p. 294.

drawn up in the following form and engrossed on stamped paper, furnished for the purpose by the purchaser of a value regulated by the amount of the purchase-money:—

I hereby certify that at a public sale held on (date) under the provisions of Regulation VII., 1825, in satisfaction of a decree of (the Court) A. B., plaintiff, or appellant, *versus* C. D., defendant or respondent, dated E. F. has purchased the right and interest of in and that his purchase has taken effect from and since the abovementioned day of sale, viz., (here repeat the date.)

(Signed) G. H., *Moonsiff, or as the case may be.*(*e*)

Liability of Officer delivering personalty before payment.

If the Officer conducting the sale of personal property delivers it to the purchaser before receiving the price, he will himself be compelled to make it good, if the purchaser fails to pay, and he will have to recover the amount from the latter in the regular course of law.(*f*)

SECTION II.

SALES UNDER ACT IV., 1846.

Act IV., 1846. In the Lower Provinces all landed property is saleable by the Court.

PREVIOUS to the year 1846, landed property not being of the kind above described, was sold by the revenue authorities upon the requisition of the Courts. The Act No. IV., 1846, however, while it continues the former system everywhere, in those cases in which the Civil Courts had actually made application to the Revenue Officers for the sale of land or of any interest in land previous to the passing of the Act, provides that, for the future, in all the territories subject to the Presidency of Fort William, except the North-Western Provinces, attachments and sales of land, or of any interest in land, in satisfaction of decrees or other process of the Courts, shall be made by the Courts, under the rules previously in

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(*e*) Cir. Ord. 11th January, 1848.

(*f*) Con. 787, 3rd May, 1833.

force regarding that description of landed property which the Courts were already empowered to sell.

Additional rules for the sale of the property made saleable by the Act.

In addition to the foregoing rules the Act IV., 1846, makes the following provisions, relating to that kind of landed property which the Courts were first authorised by that Act to sell in execution; that is to say, land and interests in land, not being houses, gardens, orchards or small parcels of lakhiraj land.

Jumma to be specified in proclamation.

The specification of the jumma, filed in Court at the time of making application for sale,(*g*) must be inserted in the notification of sale.

Deposit of fifteen per cent.

By Section 4, the purchaser at any such sale shall be required to deposit immediately either in cash, Bank of Bengal Notes or Post Bills, or Government Securities duly endorsed, fifteen per cent. on the amount of his bid, and in default of such deposit the land or interest therein, which is under sale, shall forthwith be put up again and sold, and if the purchaser having paid the deposit required shall neglect or refuse to pay the purchase-money, within the period which may be stipulated, the deposit shall be forfeited and shall be applied as if it were purchase-money, and the land or interest therein, or such portion thereof as may be sufficient to satisfy what remains due, shall be again put up to sale, due notification having been first given.

Forfeiture of deposit.

Resale.

And by Section 9, the provisions of Section 4 were declared applicable in the North-Western Provinces to sales of land or of any interest in land in execution of a decree of Court or other judicial process.

Application of forfeited deposit.

But by Act XXV., 1850, passed on the 14th June, proceeding (so far as the present purpose is concerned) on the recital that "judgment debtors fraudulently avail themselves of the provision in Section 5, Act IV., 1846, that forfeited deposits at sales of land in execution of decrees shall be applied as if they were purchase-money," so much of Sections 5 and 9,

(*g*) Supra, p. 350.

Act IV., 1846, as provides that the deposit at any sale of land or of any interest in land, under the said Act, if forfeited, shall be regarded as part of the proceeds of the sale, or applied as if it were purchase-money, is repealed. And it is provided, that any such forfeited deposit shall be applied to defray the expenses of the sale, and the surplus shall be forfeited to Government.

The provisions thus repealed, appear at first sight wholly unexceptionable, for as illusory and abortive sales tend to injure the character of the property, and to diminish the value of the security of the decreeholder, it is fair that the penalty, thus levied, shall be applied in reduction of the debt due to him. And it might be thought that the penalty of forfeiture must be equally heavy on the illusory purchaser, in whatever manner the forfeit may be applied.

The reason.

The reason of the alteration, is, that it was found, in practice, that judgment debtors, abusing the provisions of Act IV., 1846, used clandestinely to bid for their own property—to pay the deposit, which on the non-completion of the purchase was credited to the decreeholder,—and to repeat the same trick on the resale: thus in fact gaining time to pay the debt by instalments, and keeping real purchasers out of the field. The deposit being now carried to account of Government and not to that of the decreeholder, the judgment debtor will have no interest in the continuance of such practices, and it is expected that there will be free bidding for the property.

Act IV., 1846, authorizes the Sudder Court from time to time to frame (subject to the approval of the Governor General in Council,) new rules for the attachment and sale of property in satisfaction of decrees or other process of the Civil Courts.

Further rules for sales of this kind.

In exercise of this power, the Sudder Dewanny Adawlut has promulgated the following rules, regarding the sale of that description of property which the Courts were for the first time authorized to sell by Act IV., 1846;—these rules are

intended to regulate only such points of detail in conducting sales as were not before provided for.(*h*)

Who to conduct the sale.

Every sale of landed property to be made under the authority conveyed in Section 3, Act IV., 1846, shall be conducted by the Officer empowered to execute the decree in satisfaction of which the sale is proposed to be made, or under his directions; and the preliminary processes shall all be issued by him.(*i*)

Place of sale.

Sales shall ordinarily be advertised to take place at the cutcherry of the Officer under whose order the same may be directed, but when a sale is about to be made under the orders of a Moonsiff in the interior, and he may think it expedient that the sale should take place at the chief, or Sudder station of the district, he shall issue the prescribed processes to that effect, and communicate the same by roobukaree to the Judge, transmitting therewith copy of the lotbundee, exhibiting all the particulars of the intended sale. In such cases, the Judge will either instruct his Nazir to preside at the sale, or do so himself. In either case the result shall be communicated to the Moonsiff.(*j*)

If the property proposed to be sold in execution of a decree by a Moonsiff, should not be situated within such Moonsiff's jurisdiction, but should be situated within the jurisdiction of another Moonsiff in the same district, then the Moonsiff passing the decree shall transmit the sale papers to the Moonsiff within whose jurisdiction the property may be situated, with a roobukaree, requesting him to realize the amount due on the decree. The latter shall then proceed to effect a sale of the property, in the same manner as if the decree had been passed by himself. The result shall be communicated to the Moonsiff ordering the sale to be made.(*k*)

Days of sale.

The first Monday in every English month, shall be the day fixed for sales under Act IV., 1846, to take place; care being

(*h*) Cir. Ord. 17th July, 1846.
(*i*) Ibid, Rule 1.
(*j*) Ibid, Rule 2.
(*k*) Cir. Ord. 17th July 1846, Rule 3; See Civ. Guide, p. 750.

taken, in issuing the proclamation required to be made of intended sales, to allow in every instance the full period of thirty days, exclusive of the date of such proclamation, and of the day of sale; so that when notice of an intended sale is to be issued, should the first Monday in the ensuing month fall within thirty days, the sale must be fixed for the first Monday in the following month. If the first Monday in the month be an authorized holiday, the sale shall commence on the first Court day ensuing.(*l*)

Thirty clear days notice must be given.

By the date of the proclamation is meant, not the date of ordering the proclamation, but that of its actual publication and promulgation in the Mofussil.(*m*)

Continuation of sales from day to day.

Should the sales advertised to take place on a particular date, prove in any instance more than may conveniently be concluded on the day fixed, the circumstance shall be recorded by the presiding Officer; and in such cases the sales shall be continued from day to day, till the whole shall have been disposed of.(*n*)

Adjournment.

The same course shall be adopted when the presiding Officer may be unable, through indisposition or other unavoidable cause, to proceed with the sales on the day fixed. In such cases the Officer under whose orders the sales may have been directed to be made, may either direct some of his subordinate Officers to conduct the sales, or he may adjourn them from day to day, till he himself shall be able to preside.(*o*)

Postponement of sale.

Should more than a mere adjournment from day to day be requisite, and it be found necessary to postpone a sale to a subsequent date, due notice, viz., at the Court where the sale is to be made, and at the Judge's office, shall be given of the day fixed for the postponed sale to take place.(*p*)

Where the sale process must be repeated.

Should it be found necessary to postpone a sale through any error discovered in the lotbundee or advertisement, whether

(*l*) Cir. Ord. 17th July, 1846, Rule 5.

(*m*) R. S. C. 20th March, 1850; See *Bengalee Government Gazette*, 4th June.

(*n*) Cir. Ord. 17th July, 1846, Rule 6.

(*o*) Ibid, Rule 7.

(*p*) Ibid, Rule 8.

as regards the description given of the property proposed to be sold, or, (if the property consist of land paying rent,) of the jumma assessed thereon, in such case, the errors being corrected, process of sale must issue again *ab initio*.(*q*)

How the biddings are taken.

All persons shall be permitted without previous question to bid for the property exposed to sale. When the bidding has ceased, for which due time shall be allowed, the Officer presiding shall call on the highest bidder to pay down the deposit required under Section 5, Act IV., 1846. On complying with this requisition the purchaser shall be allowed fifteen days from the day of sale, reckoning that day as one of them, to make good the balance of the purchase-money. On payment of the same within the prescribed time, the presiding Officer shall grant the purchaser a receipt for the sum total and forthwith remit the amount to the treasury of the Judge of the district to which he is himself subordinate.(*r*)

Deposit.

Payment of balance.

Receipt granted.

Objections raised within a month.

Should any objections be made against the sale, within the period allowed for such representation, viz., within one month from the day of sale, the Officer by whom the sale may have been ordered, shall dispose of the same with all convenient despatch. If, however, no objections should be preferred within the prescribed period; or, if those preferred as above should be overruled, the Officer by whom the sale may have been ordered shall declare the sale to be concluded, and immediately grant a bill of sale to the purchaser agreeably to the form C. annexed hereto.(*s*)

Conclusion of sale.

Disposal of the purchase-money.

Before disposing of the purchase-money, due attention must be given to the Circular Orders No. 1 of the 6th June, 1828, Nos. 16, 2nd January 1836 and No. 42, 26th January, 1844.(*t*) When the period for disposing of it shall have arrived, the expense incurred by the party in bringing the property to sale shall first be deducted from the proceeds of sale and paid to him or her. The residue, after the further deductions autho-

(*q*) Cir. Ord. 17th July, 1846, Rule 9.
(*r*) Ibid, Rule 10.
(*s*) Cir. Ord. 17th July, 1846, Rule 11.
(*t*) See the next Chapter.

rized to be made from the proceeds of sale in the subsequent rules, shall then be disposed of according to the rules in force applicable to such cases.(u)

Where sale not conducted by Officer who ordered it.

When sales may be conducted by persons other than those who may have ordered the same, (as for instance by the Nazir) the duty of the Officer conducting the sale shall be purely ministerial, and he shall not take cognizance of any objections which may be urged against the intended sale, nor shall he postpone the sale except at the especial requisition of the Officer who may have directed the sale to be made.(v)

The foregoing rules are not intended to apply to cases in which the property proposed to be sold may be situated in a district other than that to which the Court passing the decree, in execution of which the property is proposed to be sold, appertains. In all such cases the rules prescribed by Circular Orders, Nos. 83 and 167, dated 8th May, 1840, and 24th September, 1841, will remain in force,(w) but those rules do not extend to cases in which one Moonsiff may be employed to sell under the requisition of another Moonsiff, both being subordinate to the same Judge, and consequently under the same appellate jurisdiction.(x)

Hours of sale.

No sale shall commence before noon, nor after sunset.(y)

Sale reported to Judge.

When sales are made by or under the directions of a Principal Sudder Ameen, Sudder Ameen or Moonsiff, the result of the proceedings shall be submitted to the Judge of the district at the close of the day;(z) at the close of the fifteenth day, a report shall be transmitted to the Judge, simply announcing whether the amount purchase-money has been paid in full or not.(a)

Register of sale.

Two Registers shall be kept by every Court,(b) one of the property to be sold, the other of property sold. In the latter register, sales made, but not completed by payment in

(u) Cir. Ord. 17th July, 1846, Rule 12.
(v) Ibid, Rule 13.
(w) Supra, p. 379.
(x) Cir. Ord. 17th July, 1846, Rule 14.
(y) Cir. Ord. 17th July, 1846, Rule 15.
(z) C. G. p. 752.
(a) Cir. Ord. 17th July, 1846, Rule 16.
(b) C. G. pp. 752, 753.

full of the purchase-money, are not to be entered; but payment in full having been made, they are to be entered immediately, without reference to their subsequent confirmation or otherwise.

Entries are to be authenticated by the signature of the presiding Officer of the Court to which the register belongs.(*c*)

Bill of sale on stamped paper.

The bill of sale to be granted to a purchaser under Rule 11, shall be drawn out on stamped paper according to the amount paid for the property, and the cost price of the stamp shall be paid by the purchaser according to rule in note to exemptions, No. 19, Schedule A., Regulation X., 1829, and the said bill of sale shall be deemed in any Court of Justice sufficient evidence of the title acquired thereby, being vested in the person or persons named therein from the date specified.(*d*)

Bill of sale to be evidence.

The purchase officially proclaimed.

Simultaneously with the grant of this bill of sale to the purchaser, the Officer by whose orders the sale may have been made, shall affix in his cutcherry a proclamation in the language of the district, intimating in the terms of the bill of sale, the succession of the purchaser to the rights and interests of the party whose property has been sold; a similar proclamation shall be sent to the cutcherries of the Darogahs of Police within whose jurisdiction any part of the property sold may be situated, and a third to the cutcherry of the Zemindar in whose estate the property sold may be situated: and no other process for putting the purchaser in possession shall be necessary.

SECTION III.

SALE BY COLLECTOR SINCE ACT IV., 1846.

North-Western Provinces land sold by Collector.

ACT IV., 1846, although it authorizes in the Lower Provinces, the sale of all lands and interests in land by the Judi-

(*c*) Cir. Ord. 17th July, 1846, Rules 17, 18.

(*d*) Ibid, Rule 19.

cial Officers alone, yet retains in the North-Western Provinces the services of the revenue authorities.(*e*)

It enacts that in the North-Western Provinces, attachments and sales of land, or of any interest in land in satisfaction of the decrees or other process of the Civil Court, shall (except in the case of land which the Courts were then already authorized to attach and sell) be made upon the requisition of the Court, by the Collector within whose fiscal jurisdiction the land may be situated, whether the local limits of that fiscal jurisdiction be or be not the same with the limits of the district judicially subject to the Court which makes the requisition.(*f*)

Requisition to Collector what it must specify.

Every such requisition shall specify the number of the suit, the Court which made the decree, the amount to be realized, the names of the parties, distinguishing those whose land or interest it is intended to sell, and the amount for which each is liable, if they are severally liable, and the land or interest of which each is alleged in the Schedule of the party applying for execution to be possessed of.(*g*)

The requisition of the Court ought to state the amount awarded by the decree, and to direct the Collector to sell so much of the defendant's estate, as may be considered sufficient to cover the debt; but it ought not to fix the portion of the defendant's property which is to be sold.(*h*)

Proclamation by Collector.

The Collector when thus required to sell, issues a proclamation, in the current language of the country, of any intended sale of land or any interest therein, thirty days at least before the day appointed for the sale, exclusive of the day of sale and of the day on which the proclamation is issued, and the said proclamation specifies the name of the person whose land, or whose rights and interest in certain land, are to be sold, and the jumma of the estate constituting the property, or in which the property is situated; also particulars of the property to be sold, of the time and place of sale, and of the amount due, for

(*e*) Act IV., 1846, Sec. 6.

(*f*) Sel. Rep. 29th January, 1848, v. 7, p. 426.

(*g*) Cir. Ord. 17th July, 1840, Sec. 7.

(*h*) R. S. C. 1841, September 7th, p. 16.

the recovery of which the sale is ordered, and such proclamation shall be fixed up in some conspicuous place within the village or township in which the said land is situate, or which is nearest to the said land, and in the cutcherry of the local Moonsiff, of the Collector, of the Zillah or City Judge, and of the Court from which the requisition issued.(*i*)

Objection offered before Collector to be communicated to Court.

In the event of any claim being preferred, or objection offered, to the Collector, against the sale of the lands proposed to be sold, or not belonging to the person or persons answerable for the amount of the decree, or other process, to be enforced, and consequently not liable to be sold in execution thereof; the Collector shall communicate such claim or objection with any information which his official records may enable him to furnish on the subject, to the Court which may have applied for the sale; and shall be guided by the instructions which he may receive in answer, whether to proceed on the sale or otherwise.(*j*)

Sale not to be suspended unless objection actually offered.

The circumstance of an estate being registered in the Collector's records in the name of another person than the party against whom execution has issued, does not warrant the Collector in declining to bring the estate to sale, unless a claim be actually preferred or an objection be offered.(*k*)

Summary inquiry by Judge on receipt of objection.

In all cases of a claim or objection being communicated by a Collector to the Court, enforcing a decree or other process, under the foregoing clause; or of a claim to lands proposed for sale in execution of judicial process, being received from the claimant by the Judge, or other Officer, who may have required the sale; it is his duty to enter upon an immediate summary enquiry into the truth and foundation of such claim: and if it appear proper, he instructs the Collector to postpone the intended sale until such enquiry shall have been completed.

Postponement of sale.

But no postponement takes place when the claim or objection

(*i*) Act IV., 1846, Sec. 8.

(*j*) Reg. VII., 1825, Sec. 4, Cl. 4.

(*k*) Con. 648, 22nd July, 1832, para. 2.

has not been preferred within a reasonable time after the Collector's publication of the sale, and appears to have been intentionally delayed, with a view to obstruct the sale.(*l*)

Claim fraudulently delayed.

Collector has no jurisdiction.

Claims advanced for property advertised for sale under orders of a Court are not to be decided by the Collector, but come exclusively within the cognizance of the Court ordering the sale.(*m*)

A Collector has no power even to postpone the sale without an express injunction from the Court to that effect.(*n*)

The Commissioner of Revenue has no power to interfere in these matters, and an order by him for the annulment of a sale made by the Collector in execution of a decree of Court, after it had been confirmed by the Civil Court, is a nullity.(*o*)

In a sale of lands made in the execution of a decree, the notice of sale must be promulgated or stuck up in the principal town or village appertaining to the property to be sold.(*p*)

In sales of revenue lands made by the Collectors in execution of decrees of Court, proclamation by beat of drum is not required.(*q*)

The Collector must cause it to be distinctly understood, in every case of sale held in satisfaction of a decree of Court, that it is a condition of the sale, that the purchaser succeeds to all the liabilities of the former proprietor, and that the Government claims against the mehal are in no degree affected by the sale.(*r*)

Deposits, forfeiture and resale.

The provisions stated above as to deposits, forfeiture, and resale, are applicable in the North-Western Provinces also to the sale of land or of any interest in land in execution of decrees of Court or other judicial process.(*s*)

(*l*) Reg. VII., 1825, Sec. 4, Cl. 5.

(*m*) Con. 794, West. C. 12th June, Cal. C. 5th July 1833.

(*n*) Cir. Ord. 4th September, 1840, para. 1.

(*o*) R. S. C. 25th February, 1843, p. 46.

(*p*) Sel. Rep. 3rd October, 1844, v. 7, p. 184.

(*q*) R. S. C. 14th August, 1839, p. 23.

(*r*) Cir. Ord. S. B. of Rev. 15th October, 1841, para. 2; Reg. XLV., 1793, Sec. 15.

(*s*) Supra, p. 389; Act IV., 1846, Sec. 9.

Rights of decreeholder at judicial sale.

A decreeholder, purchasing property sold at public auction in satisfaction of his own decree, is permitted to file his receipt to the extent of the sum awarded him, in lieu of paying the whole amount of purchase-money into Court, and his receipt for the amount of his claim goes in payment of so much of the purchase-money of the property sold, provided the arrangement does not interfere with the equal claims of other parties.(*t*)

But the permission to file the receipt may be withdrawn by the Judge, and payment in cash may be required by him, if it appear that the acceptance of the receipt, as equivalent to payment of the purchase-money, may be injurious to the rights of others.(*u*) As respects the delivery of possession of the property, his rights are the same with those of other purchasers. When the property sold is land paying revenue to Government, the demands of Government on the estate must be previously settled.(*v*)

A decreeholder purchasing his debtor's property at a public sale by the Collector, for a higher sum than the amount of his decree, must deposit fifteen per cent. on the whole amount of purchase-money, or the balance in full; because should the balance above the amount of the decree not be paid, the sale falls to the ground, and the purchaser forfeits the earnest money on the sum total bid by him.(*w*)

But in other cases he need make no deposit.(*x*)

If a sale has once been duly concluded, the offer of a decreeholder to take property, sold in the execution of his decree, for more money than was paid by the first purchaser, is like any other offer after sale, inadmissible.(*y*)

If the Vakeel of a judgment creditor applies on behalf of his client, praying that certain property belonging to his creditor may be publicly sold to him at a specified sum, if more

(*t*) Cir. Ord. Cal. and West. C. 18th January, 1839.

(*u*) R. S. C. 10th January, 1848, p. 123.

(*v*) Cir. Ord. Cal. and West. C. 18th January, 1839.

(*w*) Con. 1350, Cal. C. 15th July, West. C. 5th August, 1842.

(*x*) R. S. C. 6th March, 1839, p. 18.

(*y*) R. S. C. 10th December, 1831, p. 16.

be not bid for it; the client is bound by such an application, because he engages by his vakalutnamah to abide by the acts of his Vakeel.(*z*)

Property not to be injured previous to sale.

Property sold in execution of a decree, ought not to suffer any detriment before the sale. Even if no purchaser be forthcoming for a house as it stands, and if individuals should signify their willingness to purchase the materials, separately, it is not legal to detach or cause them to be detached from the building for the purpose of bringing them to separate sale, neither is it legal to cut down trees till after they shall have been sold.(*a*)

If the purchaser refuse to pay the purchase-money and to take possession, and the property on a resale be sold for a smaller sum, the difference must be realized from the purchaser by the process prescribed for enforcing a decree of Court.(*b*)

The failure of the first purchaser at a sale in execution of a decree, to make good the purchase-money, does not relieve the judgment debtor from his liability.(*c*)

Sale prevented by full payment.

The sale may of course be prevented if the defendant at any time before the actual sale, tenders such a sum as will fully satisfy the decree.(*d*)

(*z*) R. S. C. 22nd March, 1842, p. 26.

(*a*) Con. 1227, Cal. and West. 2nd August, 1839.

(*b*) Con. 554, 28th May, 1830; Cir. Ord. No. 219, 12th August, 1842, Rule 2.

(*c*) R. S. C. 2nd March, 1846, p. 76.

(*d*) Con. 130, 15th July, 1813.

CHAPTER XXX.

PROCEEDINGS AFTER SALE.

Objections within one month after sale.

IF within one month after a sale in execution of a decree, conducted either by the judicial authorities, or by Officers of the revenue upon the requisition of the judicial authorities, there be presented to the Court by which the sale may have been ordered, a petition, stating circumstantially any material irregularity which may have occurred in connexion with the sale, the Court institutes a summary inquiry into the truth of the statement, and if the irregularity be satisfactorily proved, it declares the sale null and void, and orders a resale.(*e*)

Summary inquiry.

Stamp.

The petition must be written on the stamped paper required for miscellaneous petitions.(*f*)

Objections to judicial sale by Collector.

Summary suits of this kind to set aside irregular sales of land made by Revenue Officers in satisfaction of decrees of Court, are received and tried in the first instance by the Court ordering the sale, subject to the prescribed appeal. If the sale have been made by order of the Judge, he may refer the case for investigation and report to a Principal Sudder Ameen, or a Sudder Ameen, reserving to himself the final decision.(*g*)

For what irregularities sale will be set aside.

A sale will be set aside if it has not been advertised during the prescribed time, in the proper place, and in the prescribed manner; as, (*e. g.*) if the notice of sale has not been suspended at the police thannah of the division in which the property is situated.(*h*)

(*e*) Reg. VII., 1825, Sec. 3, Cl. 3. and Sec. 5, Cl. 1.

(*f*) 2 Sev. Rep. 149.

(*g*) Govt. Ord. 15th January, 1834, No. 6.

(*h*) Reg. VII., 1825, Sec. 3, Cl. 3; Ibid, Sec. 5, Cl. 1; S. D. 1848, 26th July p. 721; Sel. Rep. 5th October, 1841, v. 7, p. 48; R. S. C. 7th September, 1841, p. 16.

For what it will not be set aside.

But failure to deposit the peon's fees for serving notice of sale in execution of a decree does not affect the legality of the sale.(*i*)

Where the Civil Court passed and forwarded to the Collector an order to stay the sale of certain property in execution of a decree, but the order was not received by the Collector until after the sale, it was held that the sale could not be set aside.(*j*)

Bid must be offered to selling Officer.

Where the Collector has been instructed to sell, it is to him and not to the Civil Court that any bid ought to be made; and even if a bid be offered to the Civil Court and notified by the Court to the Collector previous to the sale, this notice is ineffectual, and it is not considered a bid, unless it be actually made at the sale before the Collector; and the sale cannot be set aside because such a bid has been disregarded.(*k*)

Compromise not notified in time.

If a debt due under a decree, be paid or compromised, and notice of this fact is not given to the Civil Court in time to stay the sale,(*l*) or even if an order to stay the sale be obtained from the Civil Court, but not notified to the Collector or other selling Officer until after the sale,(*m*) such payment or compromise or order affords no ground for the summary reversal of the sale.

Not annulled because price small.

The Judge or other Officer conducting a sale ought to take every precaution to prevent the sale of property for less than its marketable value, but after the sale has been concluded and the bidder has been given to understand that he is the purchaser for the sum offered, the sale cannot be set aside on account of the scantiness of the price.(*n*)

(*i*) R. S. C. 17th January, 1843, p. 46.

(*j*) R. S. C. 27th December, 1842, p. 42; 17th March 1847, p. 94; S. D. 1849, 11th July, p. 283.

(*k*) R. S. C. 30th October, 1843, p. 53.

(*l*) R. S. C. 25th March, 1841, p. 4; 27th December, 1842, p. 42; 24th April, 1843, p. 48; 2 Sev. Rep. p. 205; R. S. C. 20th January, 1848, p. 125.

(*m*) R. S. C. 17th March, 1847, v. 2, p. 94; S. D. 1849, 11th July, p. 283.

(*n*) Con. 829, West. C. 20th September, Cal. C. 18th October, 1833, para. 2.

The purchaser of property sold in execution of a decree, is entitled to be put in possession of it, although a claimant, who unsuccessfully objected to its being sold, has instituted a suit for possession.(*o*)

Persons in possession not to be turned out without regular suit.

In considering objections urged after the sale, as in considering those which are preferred before it, possession is chiefly looked to.

A man in possession of certain property sold by the Collector in execution of a decree against another person, cannot be summarily dispossessed, merely because the lands had been specified in the Collector's proclamation as belonging to that other person.(*p*) A regular suit must be brought to establish that the land really belongs to the judgment debtor, and to make it subject to the decree against him.(*q*)

A party is at liberty to urge his objections in a regular suit, whether he has or has not urged them, or any of them, in a summary application to prevent the sale from taking place, or to prevent its confirmation.(*r*)

After thirty days, regular suit is necessary.

After the expiration of the thirty days, the Court cannot receive any application for summarily setting aside the sale, and any person who objects to the sale must institute a regular suit to annul it.(*s*)

Such action must be brought in the zillah within which the property is situated.(*t*)

Disputes to be determined in regular suit.

If therefore any disputes arise as to the extent of the property sold, or of the rights and interest therein previously belonging to the party to whom the purchaser has succeeded, such disputes are to be heard and determined in a regular suit and not otherwise.

Sale money kept in deposit for thirty days.

With a view to the protection of the rights of individuals who may subsequently appear to have an interest in real property, which has been sold in execution, the proceeds are

(*o*) R. S. C. 13th September, 1841, p. 17.

(*p*) Con. 10, 18th September, 1805.

(*q*) S. D. 1848, 15th April, p. 320.

(*r*) Ibid, 26th July, p. 721.

(*s*) R. S. C. 20th April, 1841, p. 7.

(*t*) R. S. C. 7th March, 1848, p. 135.

kept in deposit until the period allowed for preferring objections to the sale with a view to its immediate annulment shall have expired.(u) If no objections are offered, the money is paid out as mentioned below; and if objections are offered, the Judge upon disposing of the objection, records a proceeding or roobukaree by which he annuls or confirms the sale and states the ground of his decision. If the sale has been effected by the Collector, a copy of the proceeding is sent to that Officer for his information, and a purwannah is issued to the treasurer directing him to hold the proceeds of the sale in deposit for three months from the date of the roobukaree, when, if no appeal has been lodged, a final order is made for payment of the money.(v)

Paid out if no objection.

Proceeding recorded if there be objection.

Deposit retained for three months.

When a public sale is set aside, as invalid, if no collusion, or fraud appear on the part of the purchaser, he is entitled to receive back his purchase-money, on restoring any property delivered over to him, with or without interest, as the Court may direct.(w) And it is imperative upon the Court to declare by its decree whether the purchaser is or is not to be reimbursed.(x)

Court may direct purchase-money to be returned.

Where a sale in execution is reversed, and the deposit is ordered to be restored, the Revenue Officers are bound to comply with the order. They must not of their own authority retain the deposit, although it may have been forfeited to Government;(y) but they may appeal in the usual way from the order which directs it to be restored.

Revenue Officers must return deposit if ordered by Court.

As judicial sales can convey only "the rights and interests of the individuals answerable for the amount of the decree in execution of which the sale is made," they are treated, not only as between private parties, but also so far as Government is concerned, as mere private transfers; and it is erroneous to deduct from the sale price any arrears of revenue due from

Arrears of revenue not to be deducted from price.

(u) Cir. Ord. 6th June, 1828; Cir. Ord. 11th August, 1843.

(v) Cir. Ord. Cal. and West. C. 2nd January, 1836, para. 2.

(w) Reg. VII., 1825, Sec. 3; Ibid, Sec. 5, Cl. 1.

(x) S. D. 1849, 21st June, p. 243.

(y) Con. 1110, 20th October, 1837.

the mehal, in which the rights and interests of any person may be brought to sale, for the Government can always, without respect to ownership, resort to the land itself for satisfaction of its dues.(*z*)

Purchase-money retained to admit of appeal.

When objections are preferred to a Judge after the sale, and by him rejected, and the sale confirmed, the purchase-money, as has been already stated, must be kept in deposit for three months from the date of the order of the Judge rejecting the petition and confirming the sale.(*a*)

When the money is paid out.

If no objections are preferred within thirty days after the sale, the purchase-money is paid to the decreeholder at the expiration of that period. If objections are preferred and the decision of the Court is not appealed from, the money is paid out at the end of three months, either to the purchaser or to the decreeholder, as the case may be; if there is an appeal the purchase-money is retained to abide the event.(*b*)

Decreeholder entitled to interest.

The decreeholder is entitled to interest on the sum awarded to him by his decree till the whole amount is discharged. It is competent for the Judge to impose the payment of the accruing interest of the debt on any claimant, whose objections may in his judgment be evidently collusive and litigious, or vexatious or unfounded; such accruing interest should be calculated upon the amount thereby affected and not upon the whole amount of the decree, and should be recovered from the objector by the decreeholder.(*c*)

Judge may order objector to pay interest.

Where a sale of land in execution has been cancelled on the application of the defendant, it is competent for the Court to award to the defendant the mesne profits received by the purchaser while in possession, with interest from the date of the proceeding which ascertains the amount of mesne profits, up to the time of payment.(*d*)

(*z*) Cir. Ord. Sud. Board of Revenue, 15th October, 1841, para. 1.

(*a*) Con. 1027, West. C. 15th, Cal. C. 29th July, 1836, para. 3.

(*b*) Ibid para. 4.

(*c*) Con. 1010, Cal. C. 3rd, West. C. 24th June, 1836; 2 Sev. Rep. 167; R. S. C. 10th March, 1847, p. 92.

(*d*) R. S. C. 13th March, 1841, p. 3.

A judgment creditor is entitled to interest on a sum of money realized by the sale of his debtor's property and deposited in Court, but of which payment to him has been delayed in consequence of frivolous objections raised by the debtor.(*e*)

Investment of fund in Court.

If a sum of money is likely to be detained in Court for a considerable time, any party interested may apply to the Court for an order that it be invested in Government Securities.(*f*)

Money deposited in Court as payable to a party, should never be paid to a Vakeel, save under specific authority contained in the vakalutnamah: and an Officer making such unauthorized payment is personally responsible.(*g*)

Liability of Judge paying away money.

A Judge paying away money from his treasury contrary to the Regulations of Government, or to the express orders of the Sudder Court, makes himself personally responsible for the same.(*h*)

Consequence of purchaser refusing to take possession.

Though the purchaser refuses to take possession when tendered, the money is nevertheless paid to the decreeholder.(*i*)

Where claims to share in proceeds must be preferred.

All claims to a share in the proceeds of sales of property made in execution of decrees of Court should, in the first instance, be preferred to, and be disposed of by the Court ordering the sale, whether such decrees have been passed by that or by any other Court. It is not competent to the Appellate Court to interfere, with the view of adjudicating upon any matter of this nature, till the point come regularly before it in appeal.(*j*)

Award of distribution after 30 days from sale.

Thirty days after the sale has been holden, the Court invariably issues an award of distribution in regard of the claims of all decreeholders theretofore admitted (without reference to the possibility of giving immediate effect to such award) and when the sale is finally confirmed, the assets in deposit are distributed in accordance with the award. No claims to par-

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(*e*) R. S. C. 27th December, 1842, p. 42.

(*f*) S. D. 1848, June 20, p. 555.

(*g*) Con. 1360, West. C. 5th August, Cal. C. 9th September, 1842.

(*h*) Cir. Ord. Cal. and West C. 2nd January, 1836, para. 1.

(*i*) Con. 532, 4th December, 1829.

(*j*) Cir. Ord. 20th November, 1840.

ticipation in the proceeds of sale can be received after the award of distribution has been passed.(*k*)

Rights of decreeholders as amongst themselves.

Attachment before sale.

Where several decrees have been pronounced against a man, every decreeholder who sues for execution and takes out the usual process of attachment against his property before it is sold, becomes entitled to share in the proceeds of the sale.

If the proceeds are sufficient to satisfy all the decrees, and to pay the costs which all the decreeholders have incurred in obtaining execution, no question can arise.

Attaching creditors receive costs.

If the proceeds are not sufficient to satisfy all the decrees and costs, then in the first place the attaching shareholders are entitled to be reimbursed the costs which they have actually incurred.

In the next place the assets are distributed ratably among the decreeholders who have taken out attachment before the sale, in proportion to the amount of their several decrees, and without reference to the date of the decrees.

No priorities.

Collusive decrees not satisfied till real decrees paid.

The Court, however, in making the distribution, is competent to consider whether any of the decrees was collusively obtained or not; and to satisfy those in the first instance which may appear to have been passed in *bonâ fide* suits.

Decrees collusively obtained are not to be satisfied until those which were passed in *bonâ fide* suits have been fully discharged; for decrees of the former kind, although operative as between the parties to them, cannot affect the rights of others.

Mortgage creditor to be first paid.

It is scarcely necessary to add that if there be a *bonâ fide* mortgage of the property sold, and the mortgagee be a decreeholder, he must be paid in full before any other decreeholder can receive any thing.(*l*)

(*k*) Cir. Ord. 26th January, 1844, para. 3.

(*l*) Con. 935, Cal. and West. C. 22nd February, 1835; Con. 1056, Cal. and West. C. 21st October, 1836; Cir. Ord. 26th January, 1844; Cir. Ord. 2nd February, 1849. See the case of Baboo Ram Doss *v.* Rajah Run Bahadoor Sahee, Sel. Rep. 27th January, 1825, v. 4, p. 15, where the Sudder Court postponed a mortgage, which it did not find to be fraudulent, to a decree of later date, but query the authority of that case?

If the mortgagee be not a decreeholder, the property can only be sold subject to the mortgage.(*m*)

Claim for rent has preference.

In the case of lands sold to satisfy a decree for rent due on their account, the decreeholder has a preferable claim to the proceeds of sale, and the other decreeholders are only entitled to the balance which may remain after his claim has been satisfied.(*n*)

Litigation for proceeds of sale.

Where the proceeds realized in execution of a decree become the subject of conflicting claims by persons who were not parties to the suit, but who allege that they have purchased the rights of the original decreeholders, a regular suit must be instituted for the determination of such claims.(*o*)

One of the co-heirs of a judgment creditor having realized the amount of the decree, another co-heir cannot summarily recover his portion of the debt from the party to whom payment has been made; the remedy is by a regular action.(*p*)

(*m*) Supra, p. 369.

(*n*) R. S. C. 1st September, 1846, p. 84.

(*o*) Supra, p. 365.

(*p*) R. S. C. 11th May, 1841, p. 9.

CHAPTER XXXI.

EXECUTION AGAINST THE PERSON.

THE circumstances under which a judgment creditor may obtain execution against the person of his debtor have been already stated.(q) The writ of execution is as follows:(r)

To the Nazir of the Court of the Dewanny Adawlut for the Zillah of Hooghly.

Whereas Munsaram was directed by a decree of this Court, under date the 15th day of May 1841, to pay to Edoo Sheik the sum of rupees 500 and rupees 50, for costs of suit amounting to rupees 550; and whereas the said Munsaram having notice of the said decree, has omitted to liquidate the same, these are therefore to command you to apprehend the said Munsaram, and unless the said Munsaram shall pay to you the said sum of rupees 550 in satisfaction of the said decree, and costs, and the sum of rupees 10 for the costs of executing this process, to produce him before this Court to be dealt according to law.

Given under my hand and the seal of the Court, this 2nd day of June 1841.

L. S. A. B., *Judge.*

If debtor already in prison on criminal charge, process issues on his release.

If the judgment debtor is already in prison under the orders of the Magistrate, process of arrest should be taken out against him upon his release. The Civil Courts cannot, during the term of his custody as a criminal prisoner, require

(q) Supra, pp. 350, 355.

(r) Cir. Ord. 1st March, 1841.

the Magistrate to deliver him up when the term of that imprisonment shall have expired.(*s*)

Attachment not to issue until subsistence money has been deposited.

It is provided by Regulation VI., 1830, that no process of arrest shall issue from a Civil Court, unless the party applying for it (whether he be an ordinary party in a suit, or a Vakeel applying for the confinement of a party for non-payment of his fees, and whether the application be made on behalf of the Government or of any of its Officers, in order to recover stamp duty or other items payable to the Government) shall deposit in Court (independently of the charge for executing the process) a sum sufficient to provide for the subsistence of the prisoner, for thirty days, from the date of his commitment to jail. At the end of the thirty days, a further deposit must be made in advance for the next thirty days, and so on, till the defendant's discharge.(*t*)

It is scarcely necessary to say that although the confinement may be on account of several decrees, yet the creditor need only deposit one diet allowance.(*u*)

Amount of subsistence allowance.

The allowance must not exceed four annas nor be less than one anna a day, according to the rank and situation in life of the defendant, and the circumstances of the plaintiff. If any special reasons exist for increasing the rate beyond four annas, the Sudder Dewanny Adawlut, on a report from the Judge, or other sufficient information before them, may order such increase as they think just, not exceeding, in any instance, one rupee per diem.(*v*)

Prisoner released on non-payment of allowance.

The prisoner's allowance is payable to the Nazir of the Court, who gives monthly receipts for it to the plaintiff, dated

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(*s*) Con. 1276, Cal. C. 20th March, West. C. 24th April, 1840.

(*t*) Con. 21, 25th June, 1806; Con. 647, 15th July, 1831.

(*u*) R. S. C. 12th August, 1845, p. 70. In the case of Musst. Mimla Debbea Chowdrain, petitioner, (R. S. C. 21st March, 1842, p. 25,) and apparently also in that of the salt agent of Chittagong, petitioner, (R. C. S. 16th January, 1843, p. 45,) the judgment debtor was arrested without deposit of subsistence money by the decree-holder, and the Sudder Dewanny did not animadvert upon this violation of the law.

(*v*) R. C. S. 16th January, 1843, p. 45.

on the day on which the money may be paid. If the plaintiff neglect or refuse to pay the prescribed allowance on or before the day on which it may become due, it is the duty of the Nazir immediately to report the same in writing, under his signature, to the Judge, who is forthwith to order the defendant's discharge, and the defendant is not again liable to personal arrest and confinement on the same matter, at the instance of the same party, unless it be proved, to the satisfaction of the Court, that he has been guilty of dishonest conduct in the fraudulent concealment, or transfer, of any property that would otherwise have been available for the satisfaction of the decree or other demand on account of which he may have been originally confined.(*w*)

No allowance to prisoner in contempt.

Plaintiffs are not required to pay any allowance to defendants who may be committed to custody, for disobedience to an order of the Court.(*x*)

Judgment creditor of detaining creditor may advance subsistence money.

A judgment creditor is so far interested in the realization of judgment debts owing to his debtor, that he is entitled to advance the subsistence money of a prisoner confined in execution at the suit of the debtor, and so to prevent the prisoner from obtaining his discharge.(*y*)

On what grounds allowance may be reduced.

The Zillah Judge is authorized to reduce the subsistence allowance of a prisoner confined in the Zillah Jail, on sufficient cause being shewn, such as the fraudulent alienation of property by the debtor; or a breach of the rules of the prison; but it ought not to be reduced merely upon the application of the creditor, and without cause shewn.(*z*)

Prisoner cannot be detained after he has satisfied his creditor.

If a prisoner who has been sentenced to a reduction of his subsistence money for a breach of prison rules, satisfy his detaining creditor, the Civil Judge is bound to order his discharge, and cannot detain or fine him as a punishment for the breach of rules.(*a*)

(*w*) Reg. VI., 1830, Sec. 3.

(*x*) Reg. IV., 1793, Sec. 8, Benares, Reg. VIII., 1795, Sec. 2, Ced. and Conq. Prov., Reg. III., 1803, Sec. 10

(*y*) R. S. C. 15th June, 1841, p. 11.

(*z*) R. S. C. 15th January, 1841, p. 1, Con. 426, 14th July, 1826.

(*a*) Con. 426, 14th July, 1826.

Civil prisoners not to be put in fetters.

A civil prisoner cannot be confined in fetters merely to secure his safe detention in gaol. If indeed he has broken out of gaol and has been criminally sentenced for that offence, he may be put in fetters.(*b*)

May petition on plain paper.

Civil prisoners may petition the Judge on plain paper, on those matters only which relate to their treatment in gaol.(*c*)

Released on bail.

Liability of sureties.

A civil prisoner may be released on bail with the consent of his detaining creditor. If the sureties agree to produce him when called for, or to pay the debt, and fail to produce him accordingly, execution will be summarily ordered against the sureties.(*d*)

Released where arrangement for paying debt.

In cases of the kind mentioned above, (page 363,) if the person delivering the accepted engagement has been taken into custody, he is immediately discharged, and is not liable to further arrest in execution of the judgment, except on failure to perform the terms of his engagement; nor is any interest chargeable in such instances beyond what may be provided for in the engagement.(*e*)

Execution revived, if the engagement be not observed.

If the detaining creditor has, with the sanction of the Court, discharged his debtor from confinement upon his executing an agreement to pay the amount of the debt by instalments, the execution of the decree is only suspended by these proceedings, and may be revived if the debtor fail to perform his part of the engagement. If, however, the latter alleges any payments to have been made by him or by his surety, in pursuance of the engagement, he is permitted to prove the fact.(*f*)

What Judge can discharge.

The Judge who issued the process of arrest can alone order the release of a prisoner, and not the Judge in whose district he may have been arrested.(*g*)

In what case Judge can order release.

But the Judge cannot direct the release either absolutely or provisionally of a prisoner confined on civil process,(*h*) even

(*b*) Con. 624, 25th February, 1831.
(*c*) Con. 553, 28th May, 1830.
(*d*) R. S. C. 14th April, 1842, p. 27.
(*e*) Reg. II., 1806, Sec. 10.
(*f*) Con. 44, 7th December, 1808.
(*g*) Con. 1000, West. C. 5th February, Cal. C. 11th March, 1836.
(*h*) Con. 1114, Cal. and West. C. 24th November, 1837.

where his health is suffering from confinement or where the Judge thinks that the sale of his property will yield a considerable sum,(*i*) unless the creditor at whose instance he is confined consents to the release, or unless his insolvency is clearly established in the mode prescribed by Regulation II., 1806, Section 11.

Insolvent rules.

The regulation just referred to, was made for the relief of insolvent debtors and their sureties, who may be in confinement for the satisfaction of the decrees of the Civil Courts, and may have no means of discharging the amount demandable from them, by instalments or otherwise, and it empowers the Judges of the Zillah Courts, and the Court of Sudder Dewanny Adawlut, on receiving from the person confined, in such cases, a statement upon oath containing a full and fair disclosure of all property belonging to him, whether in land, money, or effects, or of whatever description; and whether held in his own name, or in the names of any other persons, or jointly with others, to cause inquiry to be made for the purpose of ascertaining the truth of such statement, or the validity of any objections thereto, which may be offered by the confining creditor.(*j*)

Prisoner may give in statement of property upon oath.

Judge to inquire into truth.

In order to enable the detaining creditor to offer his objections, he is served with the following notice of his debtor's application for discharge:(*k*)

In the Court of Dewanny Adawlut for the Zillah of the 24-Pergunnahs.

plaintiff or appellant,

versus defendant or respondent.

To of in the Town of Calcutta.

Whereas now in imprisonment in the jail of this district at your instance, in execution of the decree passed against him under date the

(*i*) R. S. C. 29th July, 1844, p. 60.

(*j*) Reg. II., 1806, Sec. 11.

(*k*) Cir. Ord. 9th June, 1848.

has applied for his discharge under the provisions of Section 11, Regulation II., 1806, take notice therefore, that on your appearing in this Court, [or in the Court of the Principal Sudder Ameen, as the case may be] in person or by Vakeel within days from this day's date, you shall be permitted to offer your objections to the discharge of the above-mentioned debtor, and you are hereby required to acknowledge the receipt of this notice.

Given under my hand and the seal of the Court, this day of 1850.

A. B., *Judge.*

If the result of the inquiry shall satisfy the Court, that the statement of property so delivered is true and faithful, and that the person confined possesses no other means of discharging the amount demandable from him, and if the property included in the statement, or such part thereof, as the Court may deem it proper to sell, in satisfaction of the judgment passed, shall be given up for sale; the Court on receiving such surrender of property, may cause it to be sold, in the mode prescribed by the regulations; and may order the release of the person or persons, in confinement, either with or without hazirzaminy security for his or their appearance when required.(*l*)

Property to be surrendered.

Court may order release.

By these rules, however, it is intended to grant relief in cases of real inability and fair dealing only, and they do not entitle any prisoner to be released, without full satisfaction of the judgment passed against him, if he shall be guilty of any fraudulent concealment of property, or shall have committed any manifest fraud or misdemeanor which may appear to the Court to render him an improper object of this relief.(*m*)

No release if fraudulent concealment of property.

Or misdemeanor.

What shall be deemed fraudulent conduct, depends upon the circumstances of each case; the Courts are always slow to impute fraud, and have refused to infer it from the fact that

(*l*) Reg. II., 1805, Sec. 11.
(*m*) Ibid.

land of the defendants had remained long unsold under an attachment by the Sheriff of Calcutta.(*n*)

The benefit of the Insolvent Rules may be claimed by all persons who are actually imprisoned in execution of decrees, whether in regular or in summary suits:(*o*) by pauper plaintiffs taken in execution for costs by a successful defendant,(*p*) by defendants who remain in confinement for costs, the other parts of the decree having been satisfied,(*q*) or by debtors confined in the gaol of the Zillah of the Twenty-four Pergunnahs under decrees of the Calcutta Court of Small Causes,(*r*) and also by persons who have been confined before decree in consequence of being unable to give security under Regulation II., 1806, Section 4.(*s*) These last may apply for the benefit of the Insolvent Rules after decree either before or after the execution has been sued out,(*t*) but application may not be made by persons who are not in confinement nor by those who are confined under judicial process, against whom no final decision or award has been passed.(*u*)

The prisoner has a right to be released after a fair discovery and surrender of all the property he possesses, without regard to the amount of his debt, or to the time he may have been in confinement.(*v*)

The prisoner must be put to his oath as to whether he has or has not any property, even although his creditor should be unable to point out any property belonging to him.(*w*)

The wilful concealment upon this occasion, by the debtor, of bond debts due to him, is punishable as wilful perjury.(*x*)

(*n*) R. S. C. 13th February, 1844, p. 56.

(*o*) Con. 24, 20th September, 1806; Con. 319, 21st July, 1820; Con. 372, 31st December, 1824.

(*p*) Con. 110, 3rd September, 1812, para. 4.

(*q*) Con. 309, 17th December, 1819, para. 5.

(*r*) R. S. C. 18th September, 1837, p. 15.

(*s*) Con. 1196, Cal. and West. C. 26th August, 1836, para. 2.

(*t*) Supra, Chap. XVI.

(*u*) R. S. C. 20th January, 1840, p. 30.

(*v*) Con. 308, 19th November, 1819, para. 2.

(*w*) R. S. C. 2nd September, 1844, p. 60.

(*x*) Con. 1086, Cal. C. 14th, West. C. 28th April, 1837, para. 2.

Where individuals have been imprisoned on application from a subordinate Court, the Judge of that Court is the proper person to determine whether the debtor ought to be released or not: the petition for release, however, is presented to the Zillah Judge, who may either take the deposition of the prisoner himself or refer the matter to the subordinate Court for investigation. If the subordinate Court pronounces for a release, an application is made to the Zillah Judge for an order on the jailor to that effect.(*y*)

Debtor again arrested if fraudulent concealment proved.

If the judgment creditor shall subsequently prove to the Court that the debtor at the time of his discharge under Regulation II., 1806, Section 11, had fraudulently concealed any property belonging to and known to have been possessed by him, either in his own name or in the name of others in his behalf, the Court will order the debtor to be again arrested, and to be confined until the judgment be fully satisfied.(*z*)

After-acquired property of debtor liable after release.

None of the Civil Courts have the power of granting a general and final release to a debtor; and the creditor, whether it be the Government or a private individual, may at any time after the release bring to sale, by application to the Court, in full payment of the sum adjudged due to him, any property which may be subsequently found in the possession of the debtor.(*a*)

Under Regulation II., 1806, a person complying with the provisions of that law, may be released at an early period of his confinement, however small or however great may be his liabilities under the decree against him.(*b*)

Prisoner for less than Sicca rupees 64, released after 6 months.

But with a view to prevent the protracted imprisonment of persons confined in execution of decrees for inconsiderable sums, it is provided(*c*) that no person shall be liable to personal confinement for more then six months in satisfaction of a decree for any sum not exceeding sixty-four Sicca rupees, but at the

(*y*) Con. 1108, Cal. C. 8th, West. C. 22nd September, 1837.

(*z*) Reg. II., 1806, Sec. 11.

(*a*) Reg. II., 1806, Sec. 11; Con. 1196, Cal. and West. C. 26th August' 1836, para. 5.

(*b*) Con. 328, 1st September, 1820.

(*c*) Reg XXIII., 1814, Sec. 45, Cl. 7.

expiration of that time any person so confined shall be entitled to be released; but any property which may belong to him shall, at all times either during his imprisonment or after his release, be liable to attachment and sale for the purpose of realizing the amount of the judgment, or so much thereof as shall remain due.(*d*)

If the sum for which the decree is passed does not exceed sixty-four rupees, the debtor does not lose his claim to be released at the end of six months, by executing in favour of his creditor, a kistbundy for a larger sum than sixty-four rupees, including interest and costs of suit.(*e*)

Release of person imprisoned for non-payment of fine.

It may be here mentioned, that where a person is confined by order of Court, not in execution of a decree, (in which case alone are the provisions of Regulation II., 1806 and Regulation XXIII., 1814, available for his discharge,) but in default of payment of a fine imposed by the Court, the Judge is allowed to use his own discretion in releasing the prisoner, regard being had to the circumstances under which the fine was imposed.(*f*)

(*d*) Con. 308, 19th November, 1819, para. 2.

(*e*) Con. 569, 23rd July, 1830, para. 2.

(*f*) Con. 964, West. C. 10th, Cal. C. 31st July, 1835, para. 2.

CHAPTER XXXII.

EXECUTION OF DECREES OF SUBORDINATE COURTS.

Execution of decrees of Uncovenanted Judges.

Zillah Judge does not interfere.

DECREES passed by Principal Sudder Ameens, Sudder Ameens and Moonsiffs, are executed by those Officers under the general rules prescribed for the execution of decrees passed by the Zillah Judges.(*g*) The Uncovenanted Judges act wholly of their own authority, and without reference from or to the Zillah Judge, who cannot interfere with their orders except upon appeal.(*h*)

A Zillah Judge has no authority to transfer to the Principal Sudder Ameen any application for the execution of a Moonsiff's decree.

Distinction between Moonsiff executing his own decree and executing that of another Officer.

The employment of a Moonsiff as a ministerial officer in the execution of decrees of a higher Court,(*i*) is wholly different from his employment as a Judge executing his own decrees.

In the discharge of the latter duty, he may depute an Officer to sell property which he has ordered for sale: or he may sell it himself, but in that case he is not entitled to commission on the proceeds, as he is when he acts ministerially.(*j*)

Moonsiff may try summarily claims to lakhiraj property attached in execution.

Moonsiffs, in common with other judicial Officers, are authorized(*k*) to receive and dispose of objections to the sale or transfer of property in execution of their decrees, and they may take cognizance of claims to, and to try the fact of possession of, lakhiraj(*l*) land as well as of land paying revenue,

(*g*) Reg. V., 1831, Sec. 22; Reg. VII., 1832, Sec. 7; Act VI., 1843, Sec. 5.

(*h*) Cir. Ord. West. C. 26th July, Cal. C. 1st November, 1833, para. 6; Cir. Ord. Cal. and West. C. 6th September, 1833.

(*i*) See Supra, p. 387.

(*j*) Con. 861, West. C. 7th, Cal. C. 28th February, 1834.

(*k*) Con. 1278, West. C. 5th, Cal. C. 26th June, 1840.

(*l*) Con. 798, Cal. C. 14th June, West. C. 19th July, 1833; Con. 1054, Cal. C. 14th October, West. C. 4th November, 1836.

when attached by them in execution of their own decrees. Petitions containing claims or objections of this kind are written on plain paper.

The Uncovenanted Judges, however, though they can apprehend, cannot of their own authority issue any order for the confinement of a defendant in execution of civil process.(*m*)

Uncovenanted Judges cannot commit to gaol.

They can only forward him, together with his subsistence money, to the Zillah Judge, who, unless he sees reason to the contrary, directs the defendant's commitment to gaol by means of his own Officers.

Prisoner forwarded to Judge for commitment.

The Principal Sudder Ameen has full power to pass any order connected with the case before him that the Judge himself could pass; subject to appeal to the Sudder Dewanny Adawlut.

He may therefore send a judgment debtor to the Zillah Judge, with a requisition for his confinement, whether the decree be under or above the sum of 5,000 rupees.(*n*)

If local circumstances render it dangerous or improper to send a judgment debtor to the gaol of the Zillah Judge for confinement, he may be forwarded for confinement to the Magistrate of the place where he may be most conveniently imprisoned; the subordinate Judge at the same time reporting the circumstance to the Zillah Judge, who confirms or cancels the order as he may think right.(*o*)

(*m*) Reg. VII., 1832, Sec. 7.

(*n*) Con. 1284, Cal. C. 7th August, West. C. 7th September, 1840; Cir. Ord. 18th September, 1840.

(*o*) Cir. Ord. Cal. and West. C. 21st March, 1834.

CHAPTER XXXIII.

DEFAULT OF PLAINTIFF.

Cause struck off if plaintiff is inactive for six weeks.

IT is provided by Act XXIX., 1841, in modification of enactments previously existing(*p*), that if a plaintiff in any Court shall at any time neglect to proceed in his suit for six weeks, the suit shall be dismissed; and it shall not be necessary to give the plaintiff any notice previous to dismissing his suit. The suit shall be dismissed as of course after the expiration of six weeks, without any proceeding on the part of the Court, or of the defendant or otherwise, or assignment of any reasons, unless the plaintiff (or his representative in case of his death,) upon special application, shall have previously satisfied the Court of the propriety of allowing further time. The Court shall record upon the proceedings the reasons at large for allowing further time in all cases in which further time may be allowed, but it shall not be necessary to specify the reasons for refusing any application for further time.(*q*)

Plaintiff or his representative may obtain extension of time.

Costs awarded to defendant.

And it is also enacted, that in all cases in which a suit is thus dismissed, the Court shall award to the defendant the costs he may have incurred in the suit. But such dismissal shall be no impediment to the institution of a new suit,(*r*) where the party is not precluded by lapse of time, or otherwise than by the mere circumstances of having instituted the suit dismissed, and of such dismissal; and such dismissed suit shall not stay the operation of the law of limitation.(*s*)

New suit may be instituted.

(*p*) Reg. IV., 1793, Sec. 10, Benares; Reg. VIII., 1795, Sec. 2, Ced. and Conq. Prov.; Reg. III., 1803, Sec. 12.

(*q*) Act XXIX., 1841, Sec. 1.

(*r*) Supra, p. 190; See Reg. III., 1803, Sec. 12; Reg. XXIII., 1814, Sec. 27, Cl. 1; Reg. XXVI., 1814, Sec. 12, Cl. 3; Con. 266, 19th February, 1817.

(*s*) Act XXIX., 1841, Sec. 2; Supra, p. 65.

No appeal lies against a decision passed in accordance with these provisions, other than a summary appeal on the fact of default.(*t*)

What appeal lies from this order.

The interval of the established vacations is not deducted in the calculation of the period at which the penalties of default are incurred.(*u*)

Vacations not allowed for in calculating time.

The Sudder Court has ordered, with a view to expedite business, that no order for the filing of pleadings, or presentation of exhibits, for the issue of legal process, whether of notice to the defendant or proclamation, or subpœna for the attendance of the witnesses, or for production of papers from the record, shall be passed without the simultaneous assignment of a specified period for its fulfilment, provided that the order be susceptible of execution within a given period; and provided that by existing enactments, no fixed period is allowed for such execution. Also that to the record of every pending suit or miscellaneous case, there shall be prefixed a fly leaf, on which shall be inscribed the title of every paper filed in the order of its presentation, relatively to dates, with the date of such presentation, and of the order recorded, and specification of the period which may have been allowed for the fulfilment of that order. And third, on the expiry of that period without execution of the order to which it relates, it shall be the duty of the Sherishtadar, or other Ministerial Officer to bring the fact to the notice of the presiding authority, and to lay the record of the case before him, for his instructions. Fourthly, it shall be the duty of the Sherishtadar, or other Ministerial Officer, to lay before the Court the record of every suit in which the period of six weeks may have expired, since the last act done by the plaintiff in prosecution of his suit, in order that the necessary order for striking the suit off the file may be passed, agreeably to

Rules for checking default.

Time to be fixed for performance of every order.

Time of each proceeding be added in the Record.

The Officers of Court to inform Judge of default.

(*t*) Act XXIX., 1831, Sec. 3.

(*u*) Con. 1368, West. C. 2nd, Cal. C. 23rd December, 1842; Cir. Ord. No. 25, 7th January, 1831.

Judges to exercise vigilance on this subject.

Act XXIX., 1841. Fifthly, the Judges, both Covenanted and Uncovenanted, are expected, before admitting any document on the part of the plaintiff, or permitting him to do any act in prosecution of the suit, to ascertain that no default, rendering the dismissal of the suit necessary, has been committed.(*v*)

Notification to heirs of deceased plaintiff.

In order that the heirs of a plaintiff (whether a pauper or not)(*w*) may not be put in default without having had it in their power to obey the regulations, it has been ordered(*x*) that whenever it may be certified to a Judge of whatever rank, that a plaintiff in any original suit pending in his Court, has died, the Judge is at liberty, if he deem it just and proper, to notify the fact in a publication to be affixed in his own cutcherry, and in the cutcherries of all the judicial authorities and the Collector of the district. The publication shall contain a statement of the several pending cases, in which such plaintiff was a party, and an intimation to his heirs or representatives, that, unless they attend either in person or by Vakeel for the prosecution of the depending suit before a certain day, to be fixed and named in the publication, not being more than six weeks from its date, such suit will be dismissed on default under Act XXIX., 1841.(*y*)

No default against heir till six weeks from date of notification.

Default in filing replication.

Although the plaintiff must reply within six weeks, (unless he has obtained an extension of time,) to the answer of each defendant against whom he is effectively prosecuting the suit, yet if the answer of any defendant be an admission of the truth of the plaintiff's claim, or be such as to induce the plaintiff to forego the effective prosecution of the suit as against that defendant, he may proceed with his suit against the other defendants, notwithstanding he has not replied within six weeks, or at all, to the answer of the particular defendant in question.(*z*)

Default only when plaintiff takes no step in the cause.

It has been laid down, upon the general construction of the Act XXIX., 1841, that a mere omission or oversight, such as

(*v*) Cir. Ord. 3rd January, 1845, para. 1.

(*w*) R. S. C. 10th April, 1843, p. 47.

(*x*) Cir. Ord. 5th September, 1845.

(*y*) Supra, p. 181.

(*z*) Sel. Rep. 7th February, 1846, vol. 7, p. 226.

the omission to file a replication in time to a particular answer, while the plaintiff is otherwise proceeding with his case, does not involve the penalty of dismissal.(*a*)

Pleader's absence does not excuse.

The absence on leave of a pleader engaged in a cause, is no bar to its dismissal under Section 1, Act XXIX., 1841.(*b*)

A suit cannot be dismissed both on its merits, and on account of default under Act XXIX., 1841.(*c*)

Proceedings of Moonsiff when parties not prepared.

In the Moonsiff's Court, if, after answer filed, the parties, or either of them fail to appear in person or by Vakeel when the suit is first called on for trial, it is the Moonsiff's duty to(*d*) suspend the trial, and to affix in some conspicuous place in his cutcherry, a notice that the suit will be again called on for trial after the expiration of a fixed period, being not less than ten days.

If the plaintiff does not appear within the limited time, his claim is dismissed; if the defendant fails to appear, the Moonsiff proceeds to try the cause *exparte* after the answer has been filed. It is not incumbent on the Moonsiff to wait until the expiration of six weeks before dismissing a suit for default.(*e*)

Default caused by opposite party taking the next step.

By a recent Act,(*f*) it is provided, in accordance with a well known principle of jurisprudence, that every default of a plaintiff shall be held to be cured whenever the opposite party passing over the default, shall have taken any step in the suit; and whenever the Court shall have passed judgment in the suit, whether such opposite party shall or shall not have taken any such step.

The judgment alluded to must of course be a judgment which the Court has pronounced without having had its attention called to the default. If the Court is bound *ex-officio* to dismiss on default, it is not clear that the opposite party can

(*a*) R. S. C. 11th May, 1847, p. 99.
(*b*) R. S. C. 2nd August, 1842, p. 36.
(*c*) R. S. C. 31st July, 1847, p. 114.
(*d*) Reg. XXIII., 1814, Sec. 27, Cl. 1.
(*e*) Con. 1321, West. C. 18th February, Cal. C. 8th April, 1842; See p. 213, Supra.
(*f*) Act XVII., of 1847; See Chapter XLIV., Infra.

take any step unless the Court has neglected this duty. But the act may perhaps be considered as tacitly superseding the direction for the Court to notice defaults; which direction would make the Court do what the parties can do better for themselves.

As to default in not appointing a Vakeel, the law has been already stated.(*g*)

(*g*) Supra p. 341

CHAPTER XXXIV.

OF CHANGES DURING THE PROGRESS OF A SUIT.

SECTION I.

ALTERATION OF INTEREST SUBSEQUENT TO THE INSTITUTION OF THE SUIT.

WHERE a plaint has been rightly framed, and all proper persons have been named as parties, it ought to be carried on to the conclusion, between the original plaintiffs and defendants, or those who derive title from them respectively.

Decease of party.

If a party dies pending the suit, his heirs are admitted, on their petition, to prosecute or defend it in his stead.

1. Of plaintiff.

If the plaintiff dies, his heirs are summoned by proclamation, as has been already mentioned, to come in and prosecute the suit.(*h*)

2. Of defendant.

If a party defendant dies, and if his heirs fail to apply, the plaintiff may bring them before the Court by a plaint framed for that purpose. A party succeeding another in a suit can only come in on the pleas originally urged and the evidence already taken.(*i*)

Heir of pauper party.

The alleged heir of a pauper party cannot sue or defend as a pauper, without an application for that purpose, and an inquiry into the extent of his means.(*j*)

Several claimants of heirship to res-

In one case where the respondent died pending an appeal, and the succession to him was contested, all the claimants of

(*h*) Supra, p. 422.

(*i*) S. D. 1849, p. 450.

(*j*) R. S. C. 10th April, 1843, p. 47; 1st March, 1847, p. 91.

pondent may defend an appeal.

the succession were permitted to defend the appeal; but they could only adjust their claims, as between themselves, in a separate suit for that purpose.(*k*)

In the case in which this was ruled, if the appeal had been successfully defended, the property in dispute must have been taken out of the possession of the appellants, but the Court would not have been compelled to put any of the respondents in possession of it, because it was such property as the Court of Wards was bound to protect.

Suit defective by transfer of interest during its progress.

If by any means any interest of a party in the matter in litigation becomes vested in another, the proceedings are rendered defective in proportion as that interest affects the suit; so that although the parties to the suit may remain as before, yet the end of the suit cannot be obtained.

Person acquiring interest of plaintiff may carry on suit.

If any property or right in litigation vested in a plaintiff, is transmitted in whole or in part to another, the person to whom it is transmitted is entitled to supply the defects of the suit, and to continue it and to have all the benefit of it. He is admitted to prosecute the suit, or to defend any appeal, in the place of the original plaintiff, or along with him if the (*l*) interest transmitted is only partial.

Person acquiring interest of defendant may be brought before the Court.

If any property or right, before vested in a defendant, becomes wholly or partially transmitted to another who was not originally a party to the suit; as where a suit is brought against A. as Hindoo widow and representative of B., and A. pending the suit, duly adopts a son; the plaintiff is entitled to render the suit perfect, and to continue it against the person to whom that property or right is transmitted: and on the other hand the new proprietor may come in and be admitted, upon his petition, to continue the defence, or to prosecute an appeal.

Defects occurring in course of suit may be

It seems that for the purpose of supplying defects which have thus occurred in a suit subsequently to its commence-

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(*k*) Sel. Rep. 12th September, 1814, v. 2, p. 126.

(*l*) S. D. 1847, 24th November, p. 609; Sel. Rep. 7th September, 1846, v. 7, p. 279.

ment, the Court will admit additional pleadings at any stage of the proceedings.(*m*)

remedied at any time.

The voluntary alienation of property, pending a suit, by any party to it, is not permitted to affect the rights of the other parties, if the suit proceeds without disclosure of the fact; except in so far as the alienation may disable the party from performing the ultimate decree of the Court.

Undisclosed alienation *pendente lite* does not affect rights of parties.

Generally, in case of alienation *pendente lite*, the alienee is bound by the proceedings which are had in the suit, after the alienation and before the alienee becomes a party to it; and depositions of witnesses taken after the alienation but before the alienee becomes a party to the suit, may be used by the other parties against the alienee, as they might have been used against the party under whom he claims.

How far alienee is bound by proceedings.

When a minor in whose name a suit is prosecuted or defended by his guardian, comes of age, while the suit is pending, he may apply by petition to be admitted as plaintiff or defendant; but his neglect to do so does not vitiate the decree which may be passed.(*n*)

Course pursued by minor suitor coming of age.

A person(*o*) cannot legally sue *in formâ pauperis* for lands of which he is actually in possession, and if he be, through the suppression of this fact, permitted to sue, he will be nonsuited upon the circumstance becoming known, or if he obtains possession subsequently to the institution of the suit, he will be dispaupered.

Where party will be dispaupered.

A plaintiff who has not instituted his suit as a pauper, cannot afterwards in the course of it be admitted to proceed as a pauper on proof of his poverty.(*p*)

A plaintiff originally admitted to sue as a pauper, who may subsequently, while the suit is pending, become possessed of sufficient property to nullify his plea of poverty, may be called

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(*m*) R. S. C. 21st September, 1847, p. 119, Supra, p. 204.

(*n*) S. D. 1848, 19th June, p. 551.

(*o*) Sel. Rep. 7th September, 1846, v. 7, p. 279.

(*p*) Con. No. 186, 31st August 1814, Supra, p. 201.

upon to pay up the original stamp duty in lieu of the institution fee, &c. and will be nonsuited in the event of his neglecting to do so.(q)

SECTION II.

INTERVENTION OF THIRD PARTIES.

Principle of the law of intervention.

If any third person considers that his interest will be affected by a cause which is depending, he is not bound to leave the care of his interest to either of the litigants, but he has a right to intervene, or to be made a party to the cause, and to take upon himself the defence of his own rights, provided he does not disturb the order of the proceedings.

It may take place at any stage.

The intervener may come in at any stage of the cause, and even after judgment, if an appeal lies against such judgment; for he may not know of the existence of the cause, or he may have no interest to interfere, until he applies to intervene. It is immaterial in what state the cause is, if at the time of the intervention the proceedings are not deranged by it.

No person is admitted to appeal against a sentence pronounced in a cause litigated between other parties, except for some just reason, as, where one suffers himself to be condemned in a cause, to the prejudice of his co-heirs.

Intervention may take place in all cases where the party may have an interest in the event of the suit.

Not where intervener derives title from party barred by laches.

A man cannot intervene, if his right be dependent upon that of a litigant party, whose laches has already put him out of Court.(r)

If,(s) either before or after the institution of the suit, a third person has become interested in the solvency of one of the parties to the suit, or in the property sued for, by obtain-

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(q) Con. No. 904, Cal. C. 3rd Oct. West. C. 7th November, 1834.

(r) 1 Knapp. P. C. C. 83.

(s) Sel. Rep. 24th April, 1833, v. 5, p. 296; Ibid, 9th May, 1833, p. 304; Ibid, 20th May, 1841, v. 7, p. 32; See Sel. R. 24th January 1832, v. 5, p. 163.

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ing judgment against such party, either for a sum of money, or for the property sued for, or for some interest in it; such third person may intervene for the protection of his own interest, and may, upon presenting a petition, obtain from the Court permission to prosecute or to defend the suit, especially if there be any reason to apprehend collusion between the parties to the suit.

A decree valid only as between the parties.

As it is perfectly settled that a decree cannot be enforced against a person who is not a party to it, and who does not derive his title under or through such party,(*t*) it seems reasonable to infer that (subject to the right of the defendant to require for his own safety that a certain interest shall be represented in the suit,) no person who is not originally named as a party, and who does not claim under an original party, is bound, or ought to be permitted, to intervene between the plaintiff and the defendant.

Person not interested not to intervene.

Accordingly where A. sued B. and others for land and profits, and C. presented a petition claiming rights as against both parties, C.'s petition was rejected, on the ground that the decree to be pronounced could only affect the parties to the suit;(*u*) the defendant retains the property in dispute if the plaintiff does not make out his title, and the plaintiff obtains it if he does make out his title, and C. must institute a regular suit if his title is superior to that of the successful party.(*v*)

The Court has refused to entertain the claims of a third party intervening, where it was clear that the decision could not affect his rights;—one man having sued another for possession of lands, and the Government having claimed the lands as belonging to neither party, the suit was decided as between the parties, and the Government was left to bring a regular suit against the occupants.(*w*)

(*t*) R. S. C. 15th March, 1842, p. 25.

(*u*) S. D. 1845, p. 121.

(*v*) S. D. 1846, p. 178; See Sel. Rep. 4th April, 1816, v. 2, p. 178.

(*w*) Sel. Rep. 30th December, 1816, v. 2, p. 219; See Ibid, 27th May 1841, v. 7, p. 33. It would seem that in both these cases the 3rd party only appeared in appeal; See S. D. 1846, p. 219.

Where A. sued B. on a bond granted by B. to A., the Court refused to listen, a third party, C. who appeared and alleged that he had really advanced the consideration money of the bond, and that A. was merely a trustee for him; it was held that the decree must pass, as between A. and B., and that C. must bring a separate suit.(*x*)

Nor can any injustice be thus done; for if it appears in the course of the execution of the decree, that the third party has a good title to the property against which execution is prayed, the Judge will of course proceed in the spirit of Construction 744, not executing the decree against the claimant, but referring the decreeholder to a regular suit to enforce his right against the claimant.(*y*)

Cases in which interlocutory claimants have been admitted without sufficient reason.

But there are other cases which it does not seem possible to reconcile with the very reasonable doctrines which have been laid down upon this subject.

Thus, where A. brought suit against B. to foreclose a mortgage, and to obtain possession of the property mortgaged; the defendant did not appear, but C., a person claiming the land under a title prior to that of the plaintiff, presented a petition and resisted the plaintiff's claim, which was negatived accordingly.

Here it is plain that a decree of foreclosure might have passed as between A. and B. without injuring C.(*z*)

A man pledged his property as a security for the repayment of money lent to him, for which he also gave his bond. He was afterwards sued by the lender, not for the property, but simply for the amount due on his bond. A third party, in actual possession of the property and alleging that it had been sold to him before it was pledged, was permitted to intervene and defend the suit.(*a*)

(*x*) S. D. 1848, 26th April, p. 368; See Ibid, p. 247; S. D. 1849, 16th August, p. 349.

(*y*) Supra, Chap. XXVIII. See p. 384.

(*z*) Sel. Rep. 6th October, 1841, p. 52; See S. D. 1846, 9th July, p. 272; See Sel. Rep. v. 7, p. 76; Ibid, v. 2, p. 237; Supra, p. 94.

(*a*) Sel. Rep. 19th September, 1836, v. 6, p. 108.

Decrees must ascertain rights of all claimants of real property.

It is laid down by Regulation III., 1793, Section 13, that in every suit concerning the succession or right of inheritance to a zemindary, talook, land, house or other real property to which there are more claimants than one, who by the Hindoo or Mahomedan law, (respect being had to the religion of the claimants) would be entitled to a portion of the property, the Civil Court must by the decree adjudge the property to all the claimants in the proportions to which they may be respectively entitled.(*b*)

In construing this enactment, the word "claimants" has been held to comprehend persons who were not originally parties to the suit, and who have only put in their claim by petition after the case was in preparation for decision.(*c*)

Inconvenience of admitting interlocutory claims.

This seems highly inconvenient, as on the appearance of each new claimant, the cause will have to be gone over again from the beginning; for the evidence taken before his appearance cannot justly be binding upon him unless by his own consent.

Interlocutory claimant not to prevent transfer in Collector's book.

Where a suit is brought merely to obtain the registration in the Collector's office of the name of the plaintiff, instead of that of the defendant; if the defendant agrees, a decree must pass for the plaintiff, and as the decree will not affect in any way the rights of other parties, a third party cannot intervene by petition to prevent the registration, even upon the ground that the transaction is collusive between plaintiff and defendant to defraud the petitioner.(*d*)

In a case which presented these circumstances, the Court ordered the plaintiff to pay all costs of the proceedings, because he ought to have applied to the Collector to make the alteration in his registry before instituting a suit.

It is not easy to see why the intervening party was allowed his costs, as the decree sought by the plaintiff could not affect his rights. Nor is it clear why the Court passed the decree

(*b*) Reg. III., 1793, Sec. 13.

(*c*) Sel. Rep. 28th May, 1817, v. 2, p. 237; See note (a) p. 240.

(*d*) Sel. Rep. 29th March, 1842, p. 78.

for alteration of the registry, if it was the duty of the Collector to make the alteration without decree.(*e*)

Intervention to cure defect of parties.

Sometimes an intervention takes place, merely with the view of supplying a defect of parties. Where one person contracts as agent for another, and the person for whose benefit the contract was made brings his suit to enforce it, not naming the agent as a party in the record: this defect will be cured if the agent, before evidence has been gone into, intervenes by petition, corroborating the plaintiff's statement.(*f*)

(*e*) Sel. Rep. 29th March, 1848, v. 7, p. 78; See S. D. 1850, June 5, p. 260.

(*f*) Sel. Rep. 19th September, 1836, v. 6, p. 108; See v. 7, p. 482.

CHAPTER XXXV.

REGULAR APPEAL TO THE ZILLAH COURT.

SECTION I.

HOW THE APPEAL IS BROUGHT BEFORE THE COURT.

In what cases regular appeal lies to Zillah Judge.

ANY person who is dissatisfied with the decision of a Moonsiff, or a Sudder Ameen, passed in any original suit, or with the decision of a Principal Sudder Ameen in an original suit below five thousand rupees in estimated value,(*g*) is entitled, as a matter of right, to obtain a reconsideration of the cause, by a regular appeal to the Judge of the zillah in which the lower Court is situated.(*h*)

Suit within cognizance of a lower Judge referred to a higher, appealable as if heard by lower.

When a Zillah Judge refers for trial to a Principal Sudder Ameen, a suit which is within the competency of a Sudder Ameen or a Moonsiff to decide, such suit is subject to the same rules in regard to appeal, as if it had been tried by the Sudder Ameen or the Moonsiff in the first instance.(*i*)

In all suits exceeding the amount of five thousand rupees which shall be referred to a Principal Sudder Ameen, the appeal lies to the Court of Sudder Adawlut, and is conducted in all respects like an appeal from the decision of a Zillah Judge.

The amount at which the suit is laid, not the amount awarded by the decree, determines the tribunal to which the appeal lies.

Thus in a suit laid at a sum exceeding five thousand rupees, but in which the Principal Sudder Ameen gives a decree for a

(*g*) Supra, Chap. XV.

(*h*) Reg. XXIII, 1814, Secs. 46, 73; Reg. V. 1831, Sec. 28, Cl. 2; Cir. Ord. Cal. and West. C. 6th February, 1835; Act XXV., 1837, Sec. 4. Act VI. 1843, Sec. 2.

(*i*) Act XXV., 1837. Secs. 7, 5; Supra, p. 148.

sum less than that amount, the appeal lies to the Sudder Adawlut and not to the Zillah Court.(*j*)

Who may appeal, heir or purchaser.

Any person upon whom the rights and interests of a party may have devolved, by inheritance, or purchase, or otherwise, may appeal from any decision adverse to such party.(*k*)

Judgment creditor of a party.

A judgment creditor is entitled to intervene in a case in which his debtor is defendant, to assert the right of the latter, and the liability of the contested property to satisfy his own claim. His interest in his debtor's solvency also entitles him to prefer an appeal from a judgment which has been pronounced against his debtor, or to defend an appeal preferred by the opposite party against a judgment in the debtor's favour; or where the debtor, appellant or respondent, has died, to prosecute the appeal or the defence.(*l*)

Appeal from Moonsiff within 30 days.

An appeal from the decree of a Moonsiff must be brought within thirty days from the time when the decree was delivered or tendered(*m*) to the parties,(*n*) exclusive of the day when the delivery or tender was made.(*o*)

Appeal from Principal Sudder Ameen or Sudder Ameen within 30 days.

How the time is calculated.

An appeal from the decree of a Sudder Ameen, or a Principal Sudder Ameen, must be brought within thirty days from the time when the decision was passed, exclusive of the day upon which it was passed, and also of the interval which may have elapsed in each instance between the date on which the requisite stamped paper was furnished to the Court, and that on which the copy of the decree was tendered or delivered to the party.(*p*)

No deduction for holidays.

No deduction is made on account of any Hindoo or Mussulman holiday, or of any established vacation which may occur within the period fixed for preferring appeals, but when the

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(*j*) Con. 1282, Cal. C. 7th, West. C. 26th August, 1840.

(*k*) S. D. 1848, pp. 215, 293; Supra, Chap. XXXIV.

(*l*) Sel. Rep. 24th April, 1833, vol. 5, p. 296; Ibid, 9th May, 1833, v. 5, p. 304; Ibid, 4th April, 1842, v. 7, p. 86; Supra, p. 428.

(*m*) Supra. p. 348.

(*n*) Cir. Ord. 11th June, 1845.

(*o*) Cir. Ord. 1st March, 1844.

(*p*) Act XXV., 1837, Sec. 9; Reg. XXVI., 1814, Sec. 8, Cl. 10; Con. 413, 3rd March, 1826; Cir. Ord. 1st March, 1844; Act XXV., 1837, Sec. 9; Supra, p. 345.

period expires during an adjournment of the Court on account of any holiday or vacation, the appellant is not considered to be in default, if his petition be presented immediately on the re-opening of the Court.(*q*)

Should the last day allowed for the appeal fall on a Sunday, the petition may be admitted on the following day.(*r*)

Power of Judge to admit petition after the time has elapsed.

The Zillah Judge has a discretionary power to admit an appeal from the decision of any subordinate Judge, although the petition may not have been presented within the prescribed period; if the appellant shall prove that he was prevented by circumstances beyond his control from presenting his appeal within the prescribed period, or shall shew other satisfactory cause for not having presented it before:(*s*) and it is not lawful to reject a petition of appeal merely because it is presented after the expiration of the usual period, without inquiring into the validity of the reasons assigned for the delay.(*t*)

A party who has applied to the lower Court for review of judgment,(*u*) and who, having failed in that application, presents a petition of regular appeal from the original decision, is not entitled as of right, in calculating the period allowed for appeal, to deduct the time during which his application for review was pending.

Excuse for delay must be considered.

But where such application is assigned as the reason of his having delayed his petition of appeal beyond the period prescribed, the Appellate Court will take such plea into consideration, and will admit it or not, as may seem just under the circumstances.(*v*)

The mere fact of a case having been tried *exparte* in the lower Court, forms no ground for admitting the defaulter to

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(*q*) Reg. VII., 1832, Sec. 2, Cl. 4; See Cir. Ord. 16th November, 1849, in which the holidays for A. D. 1850, are specified, amounting to about ten weeks in all, exclusive of Sundays.

(*r*) R. S. C. 29th May, 1843, p. 49.

(*s*) Act XXV., 1837, Sec. 9; Reg. XXIII., 1814, Sec. 46, Cl. 1; Con. 177, 18th April, 1828; Reg. VII., 1832, Sec. 2, Cl. 3.

(*t*) Sel. Rep. 7th May, 1819, v. 2, p. 298.

(*u*) See Infra, Chap. XXXVII.

(*v*) Con. 1127, 2nd February, 1838.

appeal after the expiration of the prescribed period,(*w*) but it is open to the applicant to shew, if he can, that the default was occasioned by no negligence of his; as, for instance, that he was not served with the process of the Court below.(*x*)

In such cases the Appellate Court ought not to enter upon the merits of the case without first calling upon the appellant to account for his default in the lower Court.(*y*)

How appeal is brought before Appellate Court.

The party dissatisfied brings his case before the Appellate Judge, simply by presenting to him, in person or by Vakeel, a petition of appeal. The petition cannot be received by the Court whose decision is appealed from.(*z*)

Appeals by paupers are separately noticed below, Chapter XLV.

The petition of appeal should state the Court in which the decree appealed against was passed, the date on which it was pronounced, the proportion of the original claim in regard of which the appeal may be instituted, the sum of money or the value of the property which may have been decreed, and also whether the decree has been executed or not.

It must contain the names of all the respondents, and must not merely refer to any of them by the words "and others," or by any general description; for the Appellate Court cannot in such case issue process against the whole of them.

A petition deficient in this last respect is considered as incomplete and inadmissible, and has not the effect of a petition of appeal, with reference to the calculation of the period allowed for appeal.(*a*)

How defect in petition may be supplied.

An appellant, however, who has omitted the names of any persons who were opposed to him in the lower Court, is allowed to supply the defect within the period of appeal, but if he neglects so to do, his appeal is rejected as incomplete.(*b*)

(*w*) R. S. C. 10th July, 1842, p. 35.

(*x*) S. D. 1847, pp. 10, 613.

(*y*) S. D. 1848, 1st March, p. 130; Ibid, 18th March, p. 213; 25th May, p. 473; Cir. Ord. 12th March, 1841.

(*z*) Reg. XXIII., 1814.

(*a*) Reg. VI., 1793, Sec. 10; Cir. Ord. 1st July, 1842, para. 1; Cir. Ord. 13th April, 1847.

(*b*) Cir. Ord. 1st July, 1842, para. 2.

This rule is not applicable to cases in which the appellant may purposely omit to name, or to indicate as repondents, any of the parties to the original suit, as for instance, if A. sues B. and C., and obtains a decree against B. only, but his claim against C. is dismissed, and he appeals only from that portion of the decree which dismisses his claim against C., he need not include B. among the respondents.(*c*)

In addition to these particulars, the petition may state shortly that the party being dissatisfied with the judgment is desirous of appealing from it. It need not (unless the appellant chooses,) be accompanied by specific grounds or reasons :(*d*) nor by a copy of the decree appealed from.(*e*)

Stamp in petition of appeal.

In appeals against the decisions of Moonsiffs, the petition is written on plain paper. In all other cases, it is written upon paper bearing a stamp in proportion to the value of the property claimed in appeal, according to the scale laid down in Regulation X., 1829.(*f*)

In estimating the value of the claim, the costs of suit are not added to the original amount.(*g*)

How the value is determined.

In an action for damages, the defendant may appeal from the decree of the lower Court, valuing his appeal at the amount of the sum decreed against him, and not at the amount of the damages laid by the plaintiff. The plaintiff, if he thinks the damages awarded him are not enough, should appeal upon that ground, and he must of course value the appeal at the whole amount he claims.(*h*)

Valuation.

When there are several defendants, and the decree is given against all, without any specification of what is due from each, the person who first appeals must, in his petition, estimate his appeal at the full amount of the decree; the appeal would not be admissible were he to write on it the amount of his alleged

(*c*) Cir. Ord. 14th July, 1843, para. 2.

(*d*) Reg. XXVI., 1814, Sec. 8, Cl. 2; Con. 863, Cal. and West. C. 14th February, 1834, para. 2.

(*e*) Reg. XXVI., 1814, Con. 1159, 20th July, 1838.

(*f*) Reg. XXVI., 1814, Sec. 8, Cl. 2; Reg. X., 1829; Supra, Chap. XV., Civil Guide, p. 211.

(*g*) Con. 1190, 14th December, 1838.

(*h*) R. S. C. 20th September, 1841, p. 18.

share. If it be stated in the decree, or can be gathered from the proceedings, what is the share of each defendant, each may appeal separately in respect of his own share.

Where defendants hold under distinct titles, and are liable in different amounts, it is the duty of every Judge to insert in his decree the amount due by each defendant, in order that they may not be deprived of their individual right of appeal.(*i*)

Objections to valuation.

Objections made in the lower Court, by the defendant, to the valuation of the property sued for, cannot be tried by the Appellate Court unless a summary or regular appeal be preferred on that particular point.(*j*)

Stamp on petition.

When the whole matter of a petition of appeal cannot be comprised in a single sheet of stamped paper, the additional sheets need not be stamped.(*k*)

Reasons of appeal to be stated.

The specific objections to the judgment appealed from, and the detailed grounds and reasons for preferring the appeal may, at the option of the party, be stated in the original petition of appeal, or may be subsequently filed as a separate pleading in the Appellate Court.

Stamp.

In the former case the *ad valorem* stamp is the only stamp required. But where the reasons are separately filed, the paper containing them is, like all the pleadings in the appeal, written on stamped paper of one rupee value in the case of appeals from the decisions of a Sudder Ameen or a Moonsiff, and of four rupees value in other cases.(*l*)

Examination by Serishtadar of petitions of appeal.

Each petition of appeal is immediately upon its presentation, examined by the Sherishtadar, or other head Native Officer of the Judge's Court, and if the stamp be sufficient, and the petition has been presented to the Court within the

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(*i*) Con. 849, 20th December, 1833; Supra, p. 333.

(*j*) Sel. Rep. 2nd November 1846, v. 7, p. 286.

(*k*) Con. 860, West. C. 21st February, Cal. C. 27th March, 1834.

(*l*) Reg. XXVI., 1814, Sec. 8, Cl. 5; Con. 556, 28th May, 1830; Reg. X., 1829, Sec. 9, Schedule B.; Reg. VII., 1832, Sec. 3; Con. 767, West. C. 8th, Cal. C. 29th March, 1833; Con. 834, Cal. C. 4th October, West. C. 8th November, 1834, Supra, p. 183.

period prescribed by law, the Officer certifies to that effect under his signature, on the back of the petition.(*m*)

Where petition admitted.

The appeal is thereupon admitted as a matter of right, and an order is at the same time passed, directing the original record of the case to be placed with the petition of appeal, to enable the Judge, when hearing the appeal, to refer to any part of the proceedings that he may consider necessary with a view to satisfy himself as to the merits of the judgment appealed from.

Under ordinary circumstances, the examination of the papers by the Officer is made, and the order, directing the original record to be placed therewith, is passed on the day on which the petition of appeal is presented, or at farthest on the next Court day.(*n*)

All cases in which any deviation from the existing rules may be observable, are brought to the special notice of the Judge.(*o*)

Precautions in transmitting record.

In despatching to the Appellate Court the record of causes appealed, the original depositions of witnesses, and the exhibits filed by the parties respectively, are forwarded in a separate cover under seal, each packet being properly endorsed, and accompanied by a list of its contents, and by a certificate of the actual state of the exhibits at the time when they were filed.(*p*)

Transference of appeals from one zillah to another.

The Sudder Court has authority to direct that the cognizance of an appeal which may be brought before any Zillah Court, subordinate to it shall be transferred to any other of its subordinate Zillah Courts: recording on its own proceedings the reason for such transfer.(*q*)

(*m*) Cir. Ord. No. 60, 24th August, 1832.

(*n*) Cir. Ord. Cal. and West. C. 28th September, 1838, para. 4; Reg. XXVI., 1814. Sec. 8; Con. 742, Cal. and West. C. 14th December, 1832.

(*o*) Cir. Ord. Cal. and West. C. 6th February, 1835, para. 1; Cir. Ord. Cal. and West. C. 28th September, 1838, para. 3.

(*p*) Cir. Ord. No. 178, Cal. and West. C. 29th July, 1836; Cir. Ord. 8th October, 1841; Supra, p. 286; See Reg. IX., 1831, S. 8; Con. 742, 14th Dec. 1832; Cir. Ord. 6th January, 1840.

(*q*) Act III., 1837, Sec. 1.

Appeals to be heard by Zillah Judge, if possible.

The Zillah Judges ought, as far as may consist with their other duties, to revise all appeals from the decisions of the Sudder Ameens and Moonsiffs, or at all events to retain a certain portion of the decisions passed by each Officer on their own files; but when the accumulation of such appeals or the arrears of business depending in the Zillah Court, render it impracticable for the Judge to dispose of the appeals with reasonable despatch, he obtains from time to time the sanction of the Sudder Court for referring a specified number of these cases to the Principal Sudder Ameen attached to his Court.(*r*)

He need not himself review the proceedings of the Court below before making such transfer.(*s*)

A Principal Sudder Ameen cannot try appeals, unless they have been transferred to him by the Judge with the sanction of the Sudder Court.(*t*)

Where both parties appeal against a decision, both the appeals ought to be heard by the same Officer; and ought not to be referred by the Zillah Judge to different authorities.(*u*)

SECTION II.

PROCEEDINGS IN ABSENCE OF RESPONDENT.

Confirmation of decree without summoning respondent.

WHEN an appeal from the decision of any Moonsiff, Sudder Ameen, or Principal Sudder Ameen, has been admitted by the Zillah Judge, it is not necessary to serve any process on the respondent in the first instance, but the Judge, or the Principal Sudder Ameen to whom the appeal stands referred, (*v*) as soon as practicable, and without reference to the place which the appeal may hold upon his file of causes—proceeds in the presence(*w*) of the appellant, or his Vakeel, to examine the

(*r*) Reg. V., 1831, Sec. 16, Cl. 2; Cir. Ord. Cal. and West. C. 6th February, 1835, para. 2.

(*s*) Ibid, para. 3.

(*t*) Con. 676, 24th February, 1832.

(*u*) S. D. 1848, 20th June, p. 557.

(*v*) Act VIII., 1850.

(*w*) See Cir. Ord. Cal. and West. C. 23rd August, 1839.

petition of appeal, and the whole or such parts of the record as he may deem necessary; and if upon a full consideration thereof and of the objections or reasons of appeal of the appellant (which must be on record before the Judge can legally enter upon this examination(*x*) he sees no reason to doubt the correctness or justness of the decision appealed from, he confirms that decision, without requiring the attendance of the opposite party; and forthwith communicates his order of confirmation, through the Court, from whose judgment the appeal was made, to the opposite party; with a view to enable such party to take immediate measures for obtaining execution of the decree.(*y*)

How the order of confirmation is framed.

In such cases the Judge does not draw up a formal decree containing a recapitulation of the proceedings of the Court of original jurisdiction, but he records a brief order in confirmation of the decision appealed from, in which he gives an abstract of the grounds urged by the appellant against the decision of the lower court, in order that, in cases open to a special appeal from his own decision, the Court of further appeal may see at once whether the appellant has brought before itself any new pleas not adduced before him, or merely those which have already been overruled in the regular appeal.

Effect of order of confirmation.

The Judge's order of confirmation, however, has the same force as a regular decree, and copies of it, when applied for by either of the parties, are required to be taken on stamped paper of the same size and value as are prescribed for copies of original decrees of the Zillah Court.(*z*)

Appeal cases thus disposed of are classed among, and are regarded as equivalent to regular appeals which have not

(*x*) R. S. C. 13th June, 1843, p. 50.

(*y*) Reg. V., 1831, Sec. 16, Cl. 3; Cir. Ord. Cal. and West. C. 19th August, 1836; Reg. IX., 1831, Sec. 2, Cl. 2; Act VII., 1838; Cir. Ord. Cal. and West. C. 28th September, 1838, para. 5.

(*z*) Cir. Ord. Cal. and West. C. 28th September, 1838, para. 6.

been rejected unheard, but have been admitted and afterwards finally dismissed on consideration of their merits.(*a*)

No additional proof at this stage.

An appellant is not allowed to bring forward additional proof in support of his claim, before the petition of appeal and the decree have been read over by the Judge.(*b*)

Effect of confirmation upon stamps and Vakeel's fees.

If the decision of the lower Court be confirmed without the attendance of the opposite party, the appellant is not entitled to receive back any portion of the value of the stamped paper on which his petition of appeal is written.(*c*)

Respondent appearing pays his own costs.

If the attendance of the opposite party be not required, and he nevertheless files an answer to the petition of appeal through a Vakeel of the Court, the fee of such Vakeel is payable by the party who employs him.(*d*)

There is no law prohibiting the attendance of the respondent either in person, or by Vakeel, during the perusal of the petition of appeal, but when he attends of his own accord he must himself defray any expenses he may incur, either in retaining a Vakeel or otherwise. It is unnecessary therefore to make any mention of costs in the order of confirmation, beyond specifying at the foot of the order, the costs which have been incurred by the appellant in the appeal, and which necessarily fall on him in the first instance, so that in the event of the decision being reversed or modified on a special appeal, provision may be made for their payment. (*e*) It is wholly erroneous in a Zillah Judge, on confirming the decision of the lower Court without summoning the respondent, to order the appellant to pay the respondent's costs, for no costs need be incurred by the respondent until he be summoned to answer the petition of appeal.(*f*)

(*a*) Con. 878, West. C. 11th April, Cal. C. 2nd May, 1834; Con. 742, Cal. and West. C. 14th December, 1832.

(*b*) Con. 790, West. C. 10th May, Cal. C. 7th June, 1833.

(*c*) Con. 675, Cal. and West. C. 17th February, 1832, para. 3; Con. 878, West. C. 11th April, Cal. C. 2nd May, 1834.

(*d*) Con. 675.

(*e*) Cir. Ord. Cal. and West. C. 28th September, 1838, para. 9.

(*f*) Cir. Ord. Cal. and West. C. 28th September, 1838, para. 8.

Remand without summoning respondent.

In what cases such order will be made.

If, on the other hand, the Judge is of opinion, that the decision or order appealed against ought to be altered or reversed as being manifestly unjust, or at variance with some regulation in force, or in opposition to the Hindoo or Mahomedan law, or other law applicable to the case, or as having been passed without sufficient investigation of the merits, or as grounded on an assumption obviously erroneous or irrelevant with reference to the points at issue, it is competent to him to issue an injunction pointing out the irregularity, illegality, or other defect apparent in the proceedings, decision, or order appealed against, and requiring that the Court, by which the same may have been held or passed, shall revise the case and proceed thereon, in such manner as may appear conformable to justice and to the regulations.(*g*)

Remand.

The grounds of remand are exceedingly various.

Cases have been remanded; —

Because the opinion of the native law Officers has not been taken on a doubtful point of law.(*h*)

Because a plea urged by either party has not been sufficiently considered or inquired into.(*i*)

Because in a suit for inheritance in the Moonsiff's Court, the usual notice inviting claimants has not been issued.(*j*)

Because a decision is based on a statement not admissible as evidence, or is based on a disputed document, which has not been produced and filed as an exhibit in the cause.(*k*)

Because the lower Court has decreed against a man on the ground of a former decree in a cause to which he was not a party, or an order which was subsequently reversed: or *vice versâ*.(*l*)

Because the decision, in a case which ought to be governed by the Mithila law, is based upon a Bengal precedent.(*m*)

(*g*) Reg. IX., 1831, Sec. 2, Cl. 2; Con. 870, West. C. 21st February, Cal. C. 27th March, 1834, See Supra, pp. 217, 322, 335.

(*h*) S. D. 1848, p. 7.

(*i*) Sel. Rep. 21st January, 1841, v. 7, p. 4, S. D. 1848, pp. 10, 14, 15.

(*j*) S. D. 1848, p. 28.

(*k*) S. D. 1848, pp. 100, 82.

(*l*) S. D. 1848, p. 292, S. D. 1850, p. 343.

(*m*) S. D. 1848, p. 767.

Because it rests on a manifest excess of jurisdiction, such as a Circular Order of the Zillah Judge, who has no power to issue Circular Orders.(*n*)

Or because it is incomplete, as where it pronounces only upon one of two claims involved in the plaint.(*o*)

Where a claim has been wholly dismissed, though only partially disputed.(*p*)

Where one of two defendants has not been included in a decree, and no reason has been given for his exemption.(*q*)

Where a claim and counter claim have been dismissed, the two judgments being plainly contradictory.(*r*)

Where the Judge has refused to take evidence at all upon a particular point, and has afterwards decreed on that very point against the party whom he has prevented from tendering evidence:(*s*) or where he has not allowed sufficient time for summoning witnesses, or has not issued the proper process to compel their attendance.(*t*)

So, where the lower Court, reversing a sale which was made in execution of a decree, fails to give directions for the reimbursement of the purchaser, or to record its reasons (as when it finds that there has been collusion on his part) for not directing him to be reimbursed.(*u*)

There must be a remand, when by the absence of any sufficient proceeding, fixing the issues, or otherwise, it is clear that there has been no proper hearing of the case in the lower Court,(*v*) or where it appears that it has not been conducted agreeably to the regulations.(*w*) As, where the answer put in by the defendant admitted of two interpretations leading to two different lines of defence, and the Judge has failed to

(*n*) S. D. 1848, p. 881.
(*o*) S. D. 1842, pp. 11, 51, 139, 312, 525.
(*p*) S. D. 1849, p. 617.
(*q*) S. D. 1849, p. 598.
(*r*) S. D. 1849, p. 610.
(*s*) Supra, p. 212.
(*t*) S. D. 1850, p. 352; Supra, p. 269.
(*u*) S. D. 1849, June 21st, p. 343, Supra, p. 404.
(*v*) S. D. 1849, 12th March, p. 58; S. D. 1850, 3rd April, p. 92; 20th April, p. 133; 8th May, p. 181; 14th May, p. 199; 20th May, p. 217.
(*w*) Sel. Rep. 10th July, 1826, v. 4, p. 173.

ascertain and record how the defendant intended his answer to be understood and which line of defence he meant to adopt; in consequence of which the investigation has been defective and erroneous with reference to the record: (*x*) or, where the decree is drawn up without regard to the enactment which enjoins that so much of all decrees as consists of the points to be decided, the decision thereon, and the reasons for the decision, shall be written originally by the Judge in his own language.(*y*)

There must be a remand where the decree is unintelligible or obscure, as where a decree is passed against the trustees of a minor, but does not shew whether they have been held personally liable, or liable only to the extent of the trust property in their hands.(*z*)

Or wherever the investigation has been obviously insufficient, or its results are not stated with sufficient clearness to enable the Appellate Court to deal with the case.(*a*)

There ought to be a remand whenever the original decree does not furnish the Appellate Court with the means of doing justice—as where in a case founded on an alleged right of pre-emption, the lower Court decides that all the requisitions preliminary to a claim of pre-emption were complied with by the plaintiff, but does not state what those preliminaries are.(*b*)

The Appellate Courts sometimes remand for further investigation, where the facts, recorded as proved, manifestly do not warrant the decision which has been pronounced—as where a man is adjudged to pay money where its receipt by him has not been established.(*c*)

In such cases in general, reversal would seem to be more proper than remand.

(*x*) S. D. 1850, 3rd May, p. 171; Supra, pp. 208, 809.

(*y*) 1848, 15th June, p. 532; Supra, p. 315.

(*z*) S. D. 1848, p. 130.

(*a*) Supra, p. 322, See *e. g.* S. D. 1850, 30th May, p. 217; June, pp. 249, 255, 270, 277, 286, 297, 299, 304, 305, 325, and the July decisions, *passim*.

(*b*) S. D. 1848, p. 12; Supra, p. 330.

(*c*) S. D. 1850, 14th May, p. 198; See p. 217, Supra.

Effect of remand upon stamp and Vakeel's fees.

If an injunction be issued for a revision of the decision, the stamp duty paid by the appellant on his petition of appeal is returned to him, and the fees of the Vakeel are limited to a sum not exceeding one-fourth of the established fee.(*d*)

Course of the Court below where cause is remanded.

When a suit is sent back for retrial, unless the order specially restrict the inquiry to any particular point or points, the whole case is considered as reopened.(*e*)

It is competent however for the higher tribunal, in remanding a case for retrial, to restrict the inquiry to any particular point or points, (*f*) as, for instance, where the defendants in an action have advanced a plea which, if correct, would have barred the jurisdiction of the Court trying the suit, but that Court has neglected to inquire into the merits of the plea; the Appellate Court will return the case, as incomplete, for investigation on that point.(*g*)

Where a cause has been decided *exparte* in the lower Court on the default of a party; if such party, on appeal, justifies the default and shews that it arose from no negligence of his own (as where the notice of action has not been duly served on the defendant)—the case ought to be remanded to the lower Court for retrial, and the superior Court ought not to enter upon the merits.(*h*)

SECTION III.

PROCEEDINGS WHERE RESPONDENT IS CALLED UPON.

Principal Sudder Ameen cannot remand.

A PRINCIPAL Sudder Ameen cannot remand a case, without summoning the respondent, but must go regularly into an investigation of the merits of all cases referred to him, where he does not at once confirm the decision without putting

(*d*) Con. 675, para. 5.

(*e*) Con. 1073, Cal. C. 10th, West. C. 24th February, 1837.

(*f*) Sel. Rep. 30th June, 1842, v. 7, p. 107.

(*g*) Sel. Rep. 21st January, 1841, v. 7, p. 4.

(*h*) S. D. 1847, pp. 10, 613; Supra, p. 435.

the respondent on his defence: and so must the Zillah Judge, in cases retained on his own file, where he does not summarily confirm the decision of the Court below, and does not see reason to remand the case.(*i*)

Investigation of the merits.

The general principles of the appeal procedure are the same with those which govern the Courts in the trial of original suit.

Notice issued to respondent.

The appellant must, within six weeks from the date of the admission of the appeal, or the formal determination of the Court not to dispose of it in the absence of the respondent, sue out process to bring the respondent before the Appellate Court.

The notice which is issued to the respondent is in the following form:(*j*)

NOTICE TO RESPONDENT.

In the Court of Dewanny Adawlut for the Zillah of Hooghly.

Buldeb Sircar, of Amirpore, Pergunnah Kowas, Zillah Moorshedabad, appellant, *versus* Kishen Peerya, widow of Nurnarain Roy, deceased, and guardian of Kishen Inder Narain Roy, infant, respondent.

To Kishen Peerya, and so forth.

Whereas Buldeb Sircar has presented a petition of appeal praying for the reversal of the decision of the Court of the Sudder Ameen, dated 5th September 1845, awarding to you possession of talook Ameerabad, in Zillah Moorshedabad; you are hereby required to acknowledge the receipt of this notice, and further to appear in person or by Vakeel in the Court of the Principal Sudder Ameen, and to deliver an answer to the petition of appeal on or before the

Given under my hand and the seal of the Court, this

L. S. A. B., *Judge.*

(*i*) Con. 796, West. C. 14th June, Cal. C. 5th July, 1833; Cir. Ord. West. C. 17th March, Cal. C. 21st April, 1837.

(*j*) Cir. Ord. 24th December, 1841; Civil Guide, p. 267.

Proclamation to respondent.

If the respondent fails to obey this notice, a proclamation issues in the following form:(*k*)

PROCLAMATION FOR THE ATTENDANCE OF THE RESPONDENT.

In the Court of Dewanny Adawlut for the Zillah of Hooghly.

Buldeb Sircar, of Amirpore, Pergunnah Kowas, Zillah Moorshedabad, appellant, *versus* Kishen Peerya, widow of Nurnarain Roy, deceased, and guardian of Kishen Inder Narain Roy, infant, respondent.

To Kishen Peerya, and so forth.

Whereas Buldeb Sircar has presented a petition of appeal, praying for the reversal of the decision of the Court of the Sudder Ameen, dated 5th September 1845, awarding to you possession of talook Ameerabad, in Zillah Moorshedabad, and whereas a notice was duly issued, requiring you to attend and to deliver an answer to the petition of appeal on or before the day , and whereas it appears from the return of the Nazir (or from the return of the Deputy Sheriff of Calcutta,) that after diligent search you were not to be found, and that the said notice was not served upon you according to the exigence thereof, proclamation therefore is hereby made, that if you do not appear in person or by Vakeel on or before the , the Court will proceed to try the cause *exparte* and give judgment, as if you had appeared and answered to the plaint.

Given under my hand and the seal of the Court, this

L. S. A. B., *Judge.*

No decision against respondent without notice.

As a general rule, no decision of the Appellate Court can be passed against any respondent until he has been summoned in the usual course.(*l*)

Where a regular appeal is transferred by one Judicial Officer to another, the latter must not proceed to hear it without

(*k*) Cir. Ord. 24th December, 1841; Civil Guide, 267.

(*l*) Con. 944, West. C. 10th April, Cal. C. 1st May, 1835; Sel. Rep. 23rd September, 1841, v. 7, p. 46; 24th July, 1850.

giving notice to the appellant of the change: and the omission to give such notice invalidates all his proceedings.(*m*)

Nor against party not before Appellate Court.

An Appellate Court cannot alter the decree of the lower Court to the disadvantage of parties not appealing therefrom, and not named as respondents, nor otherwise before it, but if an appellant thinks that the decision bears unfairly upon himself, relatively to other parties, (as where one of several defendants thinks that he has been ordered to pay more and his co-defendants less than was just,) he must summon them before it as respondents and afford them an opportunity of urging their own claims.(*n*)

Where a decree is passed in any Court against several individuals, and one of them appeals to the higher Court, but the rest do not appeal, it has been laid down that the higher Court is competent, where such a course is obviously requisite for the ends of justice, to take up the case as regards the whole of the persons against whom the decree was passed; but Appellate Courts ought generally to confine themselves to the objections to the decree which are urged by the parties who appeal.(*o*) It seems, however, far more convenient that the Court should not be more anxious to do justice than the parties to seek it, and that if any defendant does not think fit to appeal, the decree should remain unaltered as regards him, and should not be set right for him at the expense of his co-defendant who does appeal.

Where partial appeal opens the whole decree.

When only a part of the amount claimed has been decreed to the plaintiff, if he does not appeal or appear as respondent on the appeal of the defendant, the Court cannot amend the decree in his favour. But if he does appear, and in his reply to the petition of appeal objects to that part of the decree which dismissed part of his claim, it is competent to the Court

(*m*) S. D. 1850, 29th May, p. 244.

(*n*) Sel. Rep. 22nd August, 1844, v. 7, p. 180; S. D. 1850, 9th May, p. 196.

(*o*) Con. 997, Cal. C. 2nd, West. C. 22nd January, 1836.

to go into the whole merits of the case, as affecting both parties, and to decide it in the same manner as if the plaintiff had preferred a separate appeal.(*p*)

The appeal of one party brings the merits of the judgment before the superior Court, which is competent to amend an error, of which the respondent, in his answer, complains: and a separate and formal appeal on his part, is not necessary for the purpose.(*q*)

Son of deceased respondent.

Where on the death of a respondent, the name of his son is substituted on the record, the usual notice must be issued to the son.(*r*)

Security for costs not required in general.

May be required by Court at discretion.

It is not necessary in any Court of Appeal to take security for costs, but it is in the discretion of every such Court of Appeal to demand security for costs from the appellant or not, as it shall see fit, before the respondent is called upon to answer.(*s*)

What costs surety is bound for.

The appellant's surety for costs binds himself to make good the whole costs which shall be incurred by the appeal, whoever shall stand in the place of the appellant when it shall be decided, and consequently it is unnecessary, when the death of an appellant or respondent happens pending an appeal, to incur the delay and inconvenience which would be occasioned by calling for fresh securities.(*t*)

Reasons for taking security to be recorded.

If security for costs be demanded from an appellant by a Court of Appeal, in its discretion under Act III., 1845, the reasons ought to be recorded.(*u*)

Who may defend.

Any one who would be entitled to appeal, may be admitted to defend a suit.(*v*)

Pleadings in appeal.

The pleadings in regular appeals are generally filed, and the discussion conducted, in the same manner and under the same

(*p*) Con. 868, Cal. C. 14th February, West. C. 6th May, 1834.

(*q*) Sel. Rep. 31st May, 1831, v. 5, p. 120.

(*r*) S. D. 1848, p. 730.

(*s*) Act III., 1845.

(*t*) Cir. Ord. Cal. and West. C. 13th July, 1832.

(*u*) R. S. C. 17th November, 1845, p. 72.

(*v*) Sel. Rep. 12th September, 1814, v. 2, p. 126; Supra, p. 425.

rules as pleadings in original suits, but this rule is subject to many modifications.(*w*)

It is in the first instance left to the option of the respondent either to file an answer to the petition and reasons of appeal, or not, as he may think proper, but if no answer be filed by him, the Court of Appeal may direct him to file an answer to the petition, or to any particular points in it, which may appear to require an answer or explanation.(*x*)

After the respondent has answered, no further pleadings are admitted except the duplicate of the plaint which it may have become necessary to file(*y*) to make up the full value of the stamp, where a stamp of insufficient value has in the first instance been inadvertently used; or such supplemental pleadings as the Court, upon a perusal of the pleadings previously filed, and from a consideration of the circumstances alleged by the parties, shall deem it just and proper to admit to be filed.(*z*)

How the issues are fixed.

Section 12, Regulation XXVI., 1814,(*a*) prescribing the mode in which causes are first brought to a hearing, is not applicable to appeals, but only to original suits; but the proceeding which the Judge is required to draw up by Section 10, Regulation XXVI., 1814, must, in all cases, be submitted by the lower to the Appellate Court,(*b*) and the Appellate Court records on its proceedings the precise points at issue, and the grounds on which the parties maintain their several pleas, just as is done in the Court of first instance.(*c*)

The Court of Appeal(*d*) must lay down and record the points to be established in appeal, deducible from the appellant's objections to the decision of the Court below, and it

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(*w*) Reg. XXVI., 1814, Sec. 9, Cl. 1.

(*x*) Ibid, Cl. 2.

(*y*) Reg. XXVI., 1814, Sec. 7, Cl. 1.

(*z*) Ibid, Sec. 6, Cl. 3; Sec. 9, Cl. 3; See pp. 197, 200, Supra.

(*a*) Supra, pp. 207, 208; Con. 1191, 14th December, 1838.

(*b*) Cir. Ord. Cal. and West. C. 5th August, 1836.

(*c*) Reg. XXVI., 1814, Sec. 10; Cir. Ord. 2nd October, 1840, para. 3.

(*d*) Act XII., 1843; S. D. 1850, June 10th, pp. 277, 278; June 11th, p. 286; June 18th, p. 305.

must distinctly apply the evidence to each of these points, and shew how far they are established or disproved. If the issues have been erroneously fixed, so that the real merits of the case cannot be determined, there must be a remand.

The Court of Appeal ought not either to confirm or to reverse a judgment without stating its reasons.(*e*)

Where a man has disentitled himself to appeal.

A man may have disentitled himself to urge his appeal, and in that case it will not be gone into. Thus a party having acknowledged the justice of a decree given against him, by obtaining from the lower Court an extension of time to enable him to pay the money decreed, is not allowed to impeach it in appeal preferred subsequently to such acknowledgment.(*f*)

Where an appeal is preferred jointly by two appellants, it ought not to be struck off the file on the application of one of them.(*g*)

Court decides on evidence given below.

The Court of Appeal proceeds, unless there be very special reasons to the contrary, upon such evidence only as was received and recorded by the lower Court.

Where evidence is tendered in appeal which might have been adduced in the Court of first instance, and no reason is assigned for its not having been brought forward originally, such evidence will be rejected. Where, for instance, the plaintiff has, by the proceeding held for fixing the issues, been required to file proofs of particular payments, and has failed to do so, he cannot tender such proofs on appeal. It is obvious that by the ready admission of evidence at this stage, facility would be afforded for the manufacture of false testimony and for the oppression of honest suitors.(*h*)

Exception.

The Court of Appeal will receive fresh evidence in appeal, on clear and unquestionable proof that it could not be dis-

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(*e*) Ibid, S. D. 1850, May 21st, p. 219; S. D. 1848, pp. 140, 274, 331; S. D. 1850, July 10th, p. 353.

(*f*) Sel. Rep. 7th September, 1841, v. 7, p. 44.

(*g*) R. S. C. 20th April, 1841, p. 8.

(*h*) S. D. 1847, 27th April, p. 111; 26th May, p. 171; S. D. 1848, p. 1; S. D. 1850, 16th May, p. 205; 11th June, p. 289; See p. 445, Supra.

covered until after the decree of the Court of first instance.(*i*) But such evidence ought only to be received as to points which were expressly put in issue in the Court of first instance.

The Court of Appeal will not receive in evidence a document dishonestly suppressed by a party in a suit, and directly contradicting the plea on which his original defence rested.(*j*)

Right to use evidence is not forfeited by neglect.

Although a party is not entitled to be heard as of right in the Appellate Court, upon evidence which he has neglected to file in the lower Court, yet the occurrence of such neglect does not affect his right to be heard upon the evidence which he had previously filed in the lower Court.(*k*)

Retrial ordered where irregularity in proceedings of lower Court.

If any irregularity in the institution of the suit, or in the proceedings of the Court of first instance should be observed, a new trial ought to be directed, without regard to the merits.(*l*)

The merits of a case tried *exparte* on default below, are (as has been already mentioned) not to be gone into, except where the default is satisfactorily accounted for.(*m*)

Case originally decided on a deed not stamped or inadequately stamped.

If (in the North-Western Provinces) a case has been decided on the evidence of a deed requiring a stamp, but bearing an improper stamp, or written on plain paper, the decision of the lower Court should not be set aside, but it should be directed to restore the cause to its original number on the file, and to dispose of it after exercising the usual discretion as to granting or not granting an opportunity of remedy in the defect.(*n*)

Decision by Court having no jurisdiction, cannot be confirmed by Court having jurisdiction.

If the lower Court has pronounced upon a matter in which it has no jurisdiction, (as where a Sudder Ameen decides upon the validity of a claim to hold lands exempt from revenue, or where a Moonsiff tries a suit in which the cause of action did not arise, and the defendant does not reside, within his district) —the decision is an absolute nullity, and cannot be confirmed

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(*i*) Reg. V., 1793, Sec. 18.

(*j*) Sel. Rep. 25th November, 1805, v. 1. p. 112. Note.

(*k*) S. D. 1847, 9th June, p. 203.

(*l*) Cir. Ord. 13th September, 1843, para. 2.

(*m*) Supra, pp. 435, 446.

(*n*) Cir. Ord. 7th January, 1842, para. 7. See pp. 283, 284, Supra.

on appeal by the Court of the Principal Sudder Ameen, though that tribunal has original jurisdiction over such questions:(o) because the Principal Sudder Ameen would thus be exercising original jurisdiction without appeal, which the law does not empower him to do.

Where nonsuit ought to have been pronounced.

If the Appellate Court be of opinion, that the lower Court ought to have passed an order of nonsuit, the Appellate Court must itself pass an order of nonsuit, and must not decide the case upon its merits; for it is the duty of the Judge of Appeal to pronounce that order which the lower Court ought to have pronounced: and as the very reason of passing orders of nonsuit is that the case is not in a fit condition to enable the Court to deal with it on the merits, all expressions of opinion upon the merits ought to be carefully avoided; for this is in effect to make the Court of Appeal a Court of first instance, and deprive the parties of their right of appeal.(p)

Appeal from nonsuit.

In appeal from an order of nonsuit, the Appellate Court should decide upon the propriety of such order, but not upon the merits of the claim.(q)

The Appellate Court must not, without reference to the grounds of the judgment of the lower Court, reverse it on the report of an Officer deputed to make local enquiry.(r)

Grounds of decision to be fully recorded.

It is the duty of the Judge(s) in appeal to go fully into the case as set forth in the judgment of the lower Court, and to record his opinion upon all the material grounds of decision, *seriatim*, in the same manner as Judges are by law required to record their decision in original causes;(t) and to dispose of the reasons which have weighed with the lower Judge for or against the claim, in such a manner that the higher Court may be able to judge of the validity of his own reasons. Where

(o) S. D. 1848, 29th February, p. 120, S. D. 1850, July 2nd, p. 341.

(p) S. D. 1848, 4th April, p. 283; 6th April, p. 288; 20th May, p. 469, See pp. 485, 860.

(q) S. D. 1847, p. 410.

(r) S. D. 1847, p. 620.

(s) S. D. 1847, 18th January, p. 17; 14th June, p. 250; 4th September, p. 514; S. D. 1848, 4th January, pp. 2, 515.

(t) Supra, p. 315.

the lower Court has come to the conclusion that, for various reasons recorded at length in its decision, the principal document is a forgery and the whole claim founded on a conspiracy, it is not sufficient for the Appellate Judge simply to remark that the witnesses adduced have proved the execution of the document; he must shew how they have proved it, and on what ground he dissents from the unfavourable conclusions of the Court below. The Appellate Court should assign its reasons for admitting evidence which has been rejected by the lower Court;(*u*) and if it discredit, as contradictory, the evidence on which the lower Court has relied, it should clearly set forth the point, in which it perceives the contradiction.(*v*)

Decree should expressly affirm or reverse.

The decree of the Appellate Court should state distinctly whether it affirms or reverses that of the Court below, or how much of it is affirmed and how much is reversed.(*w*)

Appeal decree.

Where the plaintiff's claim has been partly allowed and partly dismissed by the lower Court, and the Judge of the Appellate Court dismisses the appeal, the effect of his order is to affirm the decree of the lower Court.(*x*) Indeed it is impossible, by the order, to dismiss the appeal and to reverse the decree of the lower Court, and an order purporting to do both is inconsistent with itself and cannot be acted upon.(*y*) But where an order dismissing the appeal is grounded on reasoning adverse to the decision of the lower Court, it becomes uncertain what the Judge of the Appellate Court really means to decide. Hence it is necessary that he should distinctly state in his judgment whether he affirms or reverses the decree of the inferior Judge, and if he gives any direction inconsistent with that decree, he should state whether he affirms the rest of the decree or not,(*z*) and if the Appellate Court makes any alteration in the decree, it ought to state precisely the grounds of that alteration.(*a*)

(*u*) S. D. 1848, p. 2.

(*v*) S. D. 1847, 14th June, pp. 248, 510; S. D. 1848, 7th January, p. 8.

(*w*) S. D. 1847, p. 2.

(*x*) S. D. 1847, 5th January, p. 2.

(*y*) S. D. 1847, 23rd September, p. 568.

(*z*) S. D. 1847, 31st August, p. 488.

(*a*) S. D. 1849, 10th May, p. 145.

Construction of appeal decree.

Where the judgment of the lower Court is expressly affirmed in appeal, any inconsistent words, subjoined to the decretal order of the Appellate Court, should be treated as surplusage, not operating to the benefit or prejudice of either party.(*b*)

Principal Sudder Ameen remands through Zillah Judge.

The Principal Sudder Ameen, in trying an appeal from the decision of a Sudder Ameen or a Moonsiff, which has been referred to him, has no authority, even should he be of opinion that the case was improperly nonsuited, to remand it to the lower Court, with directions to admit it again upon the file, and to try it upon its merits; but it is his duty to record the grounds of his opinion in a proceeding or minute, and to submit it to the Zillah Judge with the papers of the suit.(*c*)

The Judge, after a consideration of the grounds set forth in the proceeding of the Principal Sudder Ameen, returns the case to that Officer, with directions either to remand it to the Court by which it was originally decided, or to dispose of it himself.(*d*)

Principal Sudder Ameen may require additional investigation.

The Principal Sudder Ameen, however, may direct the lower Court to make any further investigation, which he may consider requisite, with a view to his deciding the suit himself,(*e*) retaining the suit on his own file in the meantime, and taking it up again when the result of the investigation has been made known to him.

An Appellate Court, in sending back a case for retrial, ought not to dictate to a lower Court what decision it should pass.(*f*)

The following passages from the directions issued by the Sudder Court to regulate the form of decrees, relate to judgments passed in appeal, generally :(*g*)

Particulars to be inserted in the decrees of the Appellate Courts.

"In the decrees of the Appellate Courts, instead of the words "original," will appear "appeal regular" or "special appeal,"

(*b*) Sel. Rep. 30th August, 1830, v. 6, p. 62.

(*c*) Cir. Ord. Cal. and West. C. 14th June, 1839.

(*d*) Ibid, para. 3.

(*e*) Cir. Ord. Cal. and West. C. 14th June, 1839, para. 4.

(*f*) Sel. Rep. 26th April, 1845, v. 7, p. 203.

(*g*) Supra, p. 317; Cir. Ord. 12th February, 1847, para. 12.

with the number of the same, and the amount both of the original claim, and the claim in appeal, and the parties will be distinguished as plaintiffs, appellants, defendants, respondents or *vice versâ*, as the case may be. Next, the description of the claim, its amount or valuation, and its foundation, the attendance or non-attendance of the parties and their Vakeels will be shortly adverted to, as directed above for the decrees of courts of first instance, and after this will come an abstract of the judgment or judgments passed by the lower Courts, and the substance of the reasons for appeal and of the answer, with the dates on which they were filed respectively. With regard to any other papers, that may be presented, the rules already laid down for observance in the Courts of original jurisdiction will be followed, but it will be unnecessary to give an abstract of any other part of the record of the lower Court than the judgment of the deciding Officer."

The Appellate Judge inserts in all decrees passed by him in appeal, the date at which the suit was originally referred to the subordinate Court for investigation and trial.(*h*)

Costs in appeal, as in original suits, generally follow the event of the suit.(*i*)

Interest allowed by the Court.

1. By Court of first instance.

When a principal sum, and interest thereon, claimed in an original suit, are adjudged to be due, the Court of first instance decrees the principal with interest from the date on which the loan was made, or on which the sum claimed became due, up to the date of the decree, together with further interest on the sum thus decreed, until the day of payment. If, however, the interest exceeds the principal, a sum equal to the principal is allowed by way of interest, and no more can be allowed except where the excess has occurred after the creditor commenced his suit to enforce payment, and where it cannot, therefore, have arisen from his delay.(*j*)

(*h*) Cir. Ord. 14th August, 1840.

(*i*) Supra, p. 335.

(*j*) Cir. Ord. 4th March, 1836; Cir. Ord 12th August, 1842; Con. 359, 19th December, 1823; Sel. Rep. 19th December, 1823, v. 3, p. 270, Sel. Rep. 5th September, 1827, v. 4, p. 261; S. D. 1847, June 21st, p. 276.

2. By Court of Appeal.

If the decision be confirmed in appeal, the Appellate Court must award interest at the rate of one per cent. per mensem, (from which it is not at liberty to depart) from the date of decree to the day of payment, on the aggregate of the principal, interest and costs awarded by the original decree.(*k*)

If the claim was dismissed by the lower, but decreed by the Appellate Court, interest is calculated on the principal sum up to the date of the decision of the lower Court as before, and on that consolidated sum of principal and interest, and the costs of suit, up to the day of payment.(*l*)

An Appellate Court is not competent to impose a fine on the respondent in an appeal case, for having instituted in the lower Court, a suit which the Appellate Court may consider to have been vexatious.(*m*)

Procedure when the error of valuation in the original suit is discovered in appeal.

Where the Court of Appeal perceives that the plaint has not been written on paper of the proper value, and does not see fit to nonsuit the plaintiff; it retains the case on its file, but returns the plaint and the decree to the lower tribunal, for the purpose of having a duplicate plaint filed, and the necessary alteration made in the computation of costs; and, on the return of the documents, it proceeds to dispose of the appeal on its merits.(*n*)

Vakeels' fees.

Generally speaking, where the appellant and respondent do not plead their cause in person, the rule is that their respective Vakeels are allowed the same fees in the Appellate Court as in other suits tried before the same tribunal.(*o*)

(*k*) Cir. Ord. Cal. and West. C. 4th March, 1836, para. 3; Reg. XIII., 1796, Sec. 3; Reg. IV., 1803, Sec. 7; Cir. Ord. Cal. and West. C. 2nd October, 1835; Cir. Ord. Cal. C. 7th April, West. C. 5th May, 1837; Sel. Rep. 18th August, 1806, v. 1, p. 154.

(*l*) Cir. Ord. Cal. and West. C. 4th March, 1836, para. 4; See further as to interest, Civil Guide, 596-600.

(*m*) Cir. Ord. Cal. and West. C. 25th January, 1833, para. 5.

(*n*) Supra, p. 198.

(*o*) Reg. XXIII., 1814.

SECTION IV.

PROCEEDINGS ON REMAND.

Vakeels called upon by Judge.

On a case being remanded for further investigation, or for new trial; if the Vakeels originally engaged in the cause be in attendance, the Judge immediately calls upon them to state, whether they have received instructions from their clients and are prepared to go on with the case, and if their answer be in the affirmative, no further notice to the parties is necessary, but the case is disposed of with the least possible delay. (*p*)

Notice to plaintiff to proceed.

Where the Vakeel of the plaintiff is not in attendance, or replies either that he has not received instructions or that he is not prepared to proceed, the Judge must immediately cause a notice in the following form, modified as the case may require, to be served on the plaintiff.

NOTICE TO PLAINTIFF TO PROSECUTE A REMANDED SUIT.

In the Court of Dewanny Adawlut for the Zillah of Hooghly.

Govindram, of Baug Bazar, in the town of Calcutta, plaintiff, *versus* Gholam Hyder, of Byedbatty, defendant.

To Govindram, of Baug Bazar, in the Town of Calcutta.

Whereas the case of Govindram, of Baug Bazar, in the town of Calcutta, *versus* Gholam Hyder, of Byedbatty, wherein you are plaintiff, which was decided by this Court (or the Court of the Moonsiff of ,) under date has been remanded by the Court of , for further investigation (or to be tried *de novo*) with directions that it be restored to its original number on the file of this Court, and it appears on enquiry, that no Vakeel is in attendance in this Court to represent you in this suit; [or, that the Vakeel retained by you during the previous investigation of the suit, though in attendance, has not received any instructions from you, and that he is not prepared to go on with the case.]

(*p*) Cir. Ord. West. C. 3rd, Cal. C. 31st August, 1838, para. 1.

Take notice, therefore, that in the event of your failing to adopt measures, either in person or by Vakeel, for the prosecution of your suit for the period of six weeks, calculated from the date of the service of this notice, the said suit will be dismissed on default.

Given under my hand and the seal of the Court, this day of

L. S. A. B., *Judge.*(q)

If the failure is on the part of the defendant, the following notice is issued.

NOTICE TO DEFENDANT TO DEFEND A REMANDED CASE.

In the Court of Dewanny Adawlut for the Zillah of Hooghly.

Ramdhun, of Byedbatty, plaintiff, *versus* Sheik Edoo, of Cossitollah, in the town of Calcutta, defendant.

To Sheik Edoo, of Cossitollah, in the town of Calcutta.

Whereas the case of Ramdhun, of Byedbatty, *versus* Sheik Edoo, of Cossitollah, in the town of Calcutta, wherein you are defendant, which was decided by this Court (or by the Court of the Principal Sudder Ameen) under date the has been remanded by the Court of for further investigation (or to be tried *de novo*) with directions that it be restored to its original number on the file of this Court, and it appears on enquiry that no Vakeel is in attendance in this Court to represent you in the suit [or that the Vakeel, &c., as in the foregoing form.] Take notice, therefore, that in the event of your failing to adopt measures, either in person or by Vakeel, on or before the to make answer in the said suit the Court will proceed to try the same *exparte*, and give judgment as if you had appeared and answered to the plaint.

Given under my hand and the seal of the Court, this day of

L. S. A. B., *Judge.*(r)

(q) Cir. Ord. 1st March, 1841.

(r) Ibid.

Proclamation where notice cannot be served.

If it be found impracticable to serve a notice on the plaintiff [or on the defendant,] the Judge immediately on the Nazir's return to that effect, issues a proclamation to be stuck up in the Court-room, and on the outer door of the plaintiff's [or the defendant's] dwelling-house, or in some conspicuous place in the village where he resides; to the effect, in the case of a plaintiff, that on his making default for six weeks from promulgation of the proclamation, his suit will be dismissed on default, and in the case of a defendant, that it will be tried *exparte*. If such default actually takes place, the cause is dealt with as intimated in the proclamation.(*s*)

Original fees cover expense of retrial.

It is the duty of the Vakeels(*t*) to make all motions and do all acts that may be requisite relative to any suit in which they may have been entertained, not only during trial but after decision, until the final judgment shall have been enforced; and the Vakeels originally engaged are not entitled, under the Regulations, to any additional fee for the extra labour of the further inquiry or retrial. The Court therefore cannot award them any additional compensation on such account.(*u*)

It is the duty of the Appellate Court, in remanding a suit for retrial, to specify that the Court to which it may be so referred, shall pass such order as may appear to it just and proper, (subject to appeal) in respect to the payment as well of its own costs, as of those already incurred by the parties in the progress of the suit through the different Courts before which it may have been brought since the date of the original action; unless any special reason should exist, rendering it equitable, in the judgment of the Appellate Court, that the costs incurred up to the date of its decision should be borne either by one of the parties, or by the parties respectively; in

(*s*) See Act XXIX., 1841.

(*t*) Reg. XXVII., 1814, Sec. 34.

(*u*) Ibid, para. 5.

which case the Appellate Court directs the payment of the same accordingly.(*v*)

In the absence of such direction, the subordinate Court, trying a suit sent back for retrial, is competent to adjudge the costs of all the Courts in such manner as may appear just; the order being of course open to appeal.(*w*)

Cases remanded are to be disposed of without delay.

Cases of this nature should invariably receive the earliest attention of the Courts to which they may have been remanded, and no time should be lost in giving effect to the orders of the higher Court, either for making further enquiry or for retrying the case.(*x*) They are to be entered according to the date of their original institution, and not under that of the remand.(*y*)

(*v*) Cir. Ord. Cal. and West. C. 4th November, 1836.

(*w*) Con. 1037, Cal. C. 10th August, West. C. 2nd September, 1836.

(*x*) Cir. Ord. Cal. and West. C. 7th July, 1837.

(*y*) Cir. Ord. Cal. C. 7th, West. C. 21st December, 1838, Cir. Ord. 19th March, 1841.

CHAPTER XXXVI.

SUMMARY APPEALS TO ZILLAH JUDGE.

Where it may be had.

WHERE any Uncovenanted Judge, of whatever degree, may have refused to admit any suit regularly cognizable by him, or may have dismissed, on the ground of delay, informality or other default, without an investigation of the merits of the case, any such suit which he may have admitted, or any suit regularly referred to him, it is competent for the Zillah Judge to receive a summary appeal from the order or decree of refusal or dismissal.(*z*)

Where summary appeal from Principal Sudder Ameen to Sudder Court.

A summary appeal from a judgment passed by the Principal Sudder Ameen in any original suit above the value of 5,000 rupees, or passed by him in appeal in any suit, lies to the same Court to which a regular appeal lies, *i. e.*, it lies to the Sudder Dewanny Adawlut, and not to the Zillah Judge.(*a*)

Period for bringing summary appeal.

Summary appeals ought to be preferred within the period prescribed for the admission of regular appeals, but if any plea be urged in explanation of the delay, the truth of such plea ought to be investigated; and if the explanation is satisfactory, the appeal ought not to be refused a hearing.(*b*)

How it is preferred.

The party preferring a summary appeal must appear in person or by Vakeel before the Appellate Court, and must present a petition on stamped paper of two rupees' value as prescribed by Regulation X., 1829, and accompanied by an attested copy of the order or decree passed in the case.(*c*)

(*z*) Reg. XXVI., 1814, Sec. 3; Reg. V., 1831, Sec. 19; Act XXII., 1838, Secs. 1, 2; Act IX., 1844, Sec. 4.

(*a*) Cir. Ord. Cal. and West. C. 23rd February, 1838, para. 5; Con. 1138, West. C. 27th April, Cal. C. 11th May 1838, para. 3, R. S. C. 21st June, 1847, p. 105.

(*b*) Reg. XXVI., 1814, Sec. 3, Cl. 5; Sel. Rep. 7th May, 1819, v. 2, p. 298; Con. 477, 18th April, 1828.

(*c*) Reg. XXVI., 1814, Sec. 3, Cl. 6, Reg. X, 1829.

No institution fee required.

He is not however liable to the payment of the stamp duty, substituted for the institution fee, by Section 13, Regulation I., 1814, and Section 17, Regulation X., 1829, nor is he required to furnish any security; except such as may be eventually judged necessary for staying the execution of the decree, from which the appeal is preferred.(*d*)

Return of stamp duty.

If the appellant has applied for the admission of a special appeal on stamped paper of the value prescribed for special appeals, and it afterwards appear that he ought to have applied for the admission of a summary appeal, the summary appeal may be admitted, and the higher stamp duty so paid is returned to him, with the deduction of two rupees, the value of the proper stamp for a petition of summary appeal.(*e*)

Proceedings on summary appeal.

Respondent not summoned.

It is not necessary to give any notice to the respondent, or to require his attendance on such summary appeal being preferred, unless in any particular instance the Court may deem it proper to adopt that measure; nor are any pleadings or proceedings holden on such summary appeal, excepting such as may suffice to determine whether the suit was or was not rejected or dismissed by the lower Court on sufficient grounds and in conformity with the Regulations.(*f*)

In what cases respondent is summoned.

If upon such summary pleadings, it shall appear to the Court that the suit was rejected in the first instance, or after being admitted, was dismissed, without an investigation of the merits, upon insufficient grounds, or in opposition to the Regulations;—that is to say, that such rejection or dismissal proceeded on grounds which were not sufficient according to the Regulations to warrant it; or that any of the forms prescribed by the Regulations for calling upon a party to shew cause why his suit should not be rejected or dismissed, had not been complied with previous to the dismissal or rejection of the suit; the Court of Appeal may direct the lower Court to receive the original suit or appeal, or to revive it, if it shall

Direction to lower Court to receive the case.

(*d*) Ibid, Cl. 7, infra, Chapter XLII.
(*e*) Con. 613, 25th November, 1831.
(*f*) Ibid, Cl. 8.

have been received and dismissed, and to try and determine such cause on its merits, according to the Regulations.(*g*)

Where summary appeal is inapplicable.

A summary appeal does not lie from an order of a lower Court, rejecting a claim in a regular suit, because of the documentary evidence of the plaintiff being invalid for want of the prescribed stamp,(*h*) nor from a judgment passed by a Principal Sudder Ameen in a cause in which he had no jurisdiction.(*i*)

Where a suit was brought on behalf of A. by a person not duly authorized on his part, and judgment of dismissal was pronounced, mainly upon that consideration; and a second suit for the same matter was brought by A. in person, but was dismissed without investigation of the merits on account of the previous decision; a summary appeal was admitted from the second judgment.(*j*)

Where it is applicable.

A summary appeal may be had from a nonsuit for undervaluation, if it can be shewn by the plaintiff that the value of the property claimed has not been understated by him, and that consequently that the order was erroneous.(*k*)

From what interlocutory orders appeal will lie.

The Zillah Court may review, upon summary appeal, interlocutory orders of the following kinds, passed by a Principal Sudder Ameen in cases laid under five thousand rupees, or by a Sudder Ameen or a Moonsiff.(*l*)

1. Orders in regard to the objections preferred by the defendant to the plaintiff's valuation of his suit.(*m*)

2. Orders by which the plaintiff is permitted to file a duplicate plaint in order to remedy a defect in valuation.(*n*)

(*g*) Reg. XXVI., 1814, Sec. 3, Cl. 9; Con. 805, Cal. C. 19th July, West. C. 6th September, 1833.

(*h*) R S. C. 11th April, 1843, p. 47.

(*i*) R. S. C. 24th May, 1842, p. 31.

(*j*) Sel. Rep. 12th May, 1812, v. 2.

(*k*) Con. 872, West. C. 21st February, Cal. C. 24th October, 1834, p. 14.

(*l*) Cir. Ord. 2nd February, 1849.

(*m*) This may also form the subject of a regular appeal after the case has been decided; Supra, p. 438, and see Con. 1046, West. C. 2nd, Cal. C. 16th September, 1836; Supra, p. 197.

(*n*) Supra, p. 197; Reg. X., 1829, Sched. B. Art. 8; Con. 1046, West. C. 2nd, Cal. C. 16th September, 1836.

3. Orders passed with reference to the succession of parties to a suit who die while the suit is pending.(*o*)

The Zillah Court likewise entertains summary appeals from orders by Sudder Ameen or Moonsiff as to taking security for the appearance of a defendant or the imposition of fines under Act VI., 1843, Section 4.(*p*)

It would seem that subject to these exceptions, there is no appeal from any interlocutory order passed by any Court, connected with the investigation of a suit (such as an order directing the deputation of an Ameen for local inquiry) or with the final decision thereon.(*q*)

Fine for groundless appeal.

If the summary appeal is found to be groundless and litigious, it is the duty of the Appellate Court to reject the petition, and to impose upon the litigious appellant a suitable fine, not exceeding the amount of the stamp duty which would have been payable by him on the institution of such a case, as a regular suit or appeal. All orders of the immediate Appellate Court, imposing fines or rejecting petitions of summary appeal, are final and conclusive, and no petition for a summary appeal can be carried further than to the first Appellate Court,(*r*) but the rejection of a summary appeal is no bar to the admission of a regular appeal, if the latter be otherwise admissible according to the Regulations affecting regular appeals.(*s*)

Decision of first Appellate Court conclusive.

(*o*) Supra, pp. 422, 425, 426.

(*p*) Supra, p. 159.

(*q*) Cir. Ord. 2nd February, 1849, R. S. C. 20th November, 1848, p. 147, See R. S. C. 4th July, 1843, p. 51.

(*r*) Reg. XXVI., 1814, Sec. 3, Cl. 10; See p. 471, infra.

(*s*) Con. 723, 19th October, 1832.

CHAPTER XXXVII.

REVIEW OF JUDGMENT BY COURTS BELOW THE SUDDER DEWANNY ADAWLUT.

SECTION I.

REVIEW OF JUDGMENT BY THE ZILLAH JUDGE.

Who may apply for review.

IF any person considers himself aggrieved by a decree passed in an original suit, or appeal, by a Zillah Court, from which decree no further appeal has been admitted by the Sudder Court; and if, from the discovery of new matter or evidence, which was not within his knowledge, or could not be adduced by him at the time when the decree was passed, or from any other good and sufficient reason, he is desirous of obtaining a review of the judgment passed against him; he may present a petition for this purpose to the Court which pronounced the decree.(*t*) Parties may apply in like manner for the review of a summary order passed in the execution of a decree; or a remand for irregularity;(*u*) or an order dismissing a suit on default, or without any investigation of its merits.(*v*)

How the application is made.

The petition is presented within the period of three calendar months from the delivery or tender of the decree, calculated according to the rules stated above(*w*) and it is written on stamped paper.(*x*)

Stamps incident to review.

Petitions for a review of judgment are written on the stamped paper ordained for miscellaneous petitions, provided they are

(*t* Reg. XXVI., 1814, Sec. 4.

(*u*) Con. 1375, West. C. 31st January, Cal. C. 24th February, 1843.

(*v*) Con. 1269, West. C. 3rd January, Cal. C. 7th February, 1840; Con. 1057, Cal. C. 11th, West. C. 25th November, 1836; R. S. C. 9th August, 1847, p. 115.

(*w*) p. 345.

(*x*) Reg. XXVI., 1814, Sec. 4.

presented within the period of three calendar months from the delivery or tender of the decree. When the petition is presented after that period, it is written upon an *ad valorem* stamp like a petition of regular appeal; unless the party desiring the review be a pauper, in which case the provisions relative to pauper appellants, contained in Regulation XXVIII., 1814, are held applicable.(*y*)

Although petitions presented after the lapse of three months are liable to a higher stamp duty, yet the exaction of this higher duty is founded merely on the inconvenience attending the delay, and the payment of it does not at all entitle the petitioner to the privilege of a review of judgment, unless he be able to shew just and reasonable ground to the satisfaction of the Court, for not having preferred his application within the limited period.(*z*)

What must accompany petition.

An application for review ought to be accompanied by a copy of the decree or order complained of, and if there has been delay in making the application for review, the reason must be set forth in the petition. An application deficient in these respects ought not, strictly speaking, to be entertained;(*a*) but the Court may, at its discretion, allow the reasons to be assigned orally.(*b*)

By whom the application should be disposed of.

An application for a review of judgment should, if possible, be received and disposed of by the Judge who passed the decision.(*c*) Where a Zillah Judge has obtained(*d*) leave of absence for a period exceeding six months, and there is a reasonable probability of his remaining absent for more than six months, his successor may receive and act upon applications for review without waiting for the expiration of the term of six months. A judgment passed by an additional Judge while he officiated for the Judge of the district, is to be re-

(*y*) Reg. II., 1825, Sec. 2, Cl. 1; Reg. X., 1829.

(*z*) Con. 490, 15th December, 1828, Hunter and Co., *v.* Govind Chund, S. D. A. 16th July, 1850.

(*a*) R. S. C. 18th April, 1842, p. 28.

(*b*) Hunter and Co., *v.* Govind Chund, S. D. A. 16th July, 1850.

(*c*) Reg. II., 1825, Sec. 3.

(*d*) Cir. Ord. Cal. and West. C. 7th June, 1839.

viewed by the former if still attached to the district, and not by the Judge.(*e*)

Causes of review.

It is scarcely possible to enumerate the circumstances which may be deemed to constitute good and sufficient reason for a review of judgment; but any manifest oversight of the Court, by which injustice may have been done, affords such reason. Thus a review has been granted where a plea of insanity set up by the plaintiff, had not been investigated;(*f*) and where a decision awarded to an auction purchaser, possession of certain lands, which lands, not being specified among the auction papers or in the plaint under the denomination given them in the decree, were apparently different from those claimed.(*g*)

If the Judge whose decision is sought to be reviewed, dismissed the suit on the strength of a decree of a higher Court, and the latter decree has subsequently been reversed on appeal, this is a good ground for a review of judgment.(*h*)

Review granted without summoning opposite party.

An application for review may be admitted *exparte* on the ground of obvious error, without summoning the opposite party to shew cause.(*i*)

Review not barred by rejection of special appeal.

Where the Sudder Court has rejected an application for a special appeal from the decision of a lower Court, the latter is still at liberty to entertain an application for review of judgment.

When, on the other hand, the decision of a Zillah Judge has been confirmed by the Sudder Court or by a single Judge of that Court, in any form in which an order of confirmation may legally be passed, the order is a judgment of the Sudder Court, and is open to review by it only.(*j*)

Rejection by Zillah Judge is final.

If a Zillah Judge rejects an application for a review of his own judgment, either in an original suit or in an appeal of any kind, his order of rejection is final.(*k*)

(*e*) Con. 1123, 29th December, 1837.

(*f*) Sel. Rep. 24th July, 1822, v. 3, p. 162.

(*g*) Sel. Rep. 4th April, 1816, v. 2, p. 176.

(*h*) Con. 551, 7th May, 1830.

(*i*) Sel. Rep. 19th July, 1833, v. 5, p. 307.

(*j*) Con. 1057, Cal. C. 11th, West. C. 25th November, 1836, para. 3.

(*k*) R. S. C. 5th January, 1842, p. 21; 13th January, 1842, p. 22; Ibid, 13th February, 1841, p. 3.

Where Judge is favourable he applies for permission to review.

Even if the opinion of the Judge be in favour of the application for review, he can only grant a review with permission of the Sudder Court.(*l*)

Review admitted after time on cause shewn.

The Court always records its reasons for admitting such applications after the limited period. If the Court reject the petition, its order to that effect is final; but if it be of opinion, that the review desired is necessary to correct an evident error, or omission, or is otherwise requisite for the ends of justice, it reports in this sense to the Sudder Dewanny Adawlut, transmitting at the same time, a statement of the grounds of its opinion, with a copy of the petition and of the decree passed in the case.(*m*)

Nature of application to Sudder Dewanny Adawlut by Judge.

The grounds of the opinion of the Judge should be distinctly stated in his letter requesting permission to review his judgment. If, for instance, the plea be the discovery of new matter or evidence which was not within the knowledge of the party, or could not be adduced by him at the time when judgment was passed; the manner in which the new matter was discovered, and the cause of the inability of the party to produce the evidence in proper time, with the proof of the fact, should be clearly detailed, as well as the effect which the new matter or evidence would have in impeaching(*n*) the propriety of the judgment. When the Judges submit an application for permission to review a former judgment, they state in the margin of their report the date on which a copy of the decree or order, revision of which is sought, was delivered or tendered to the applicants, the date on which the petition soliciting review was presented, and the value of the stamped paper on which the petition is engrossed.(*o*)

A Judge, if he applies for authority to admit a review of judgment passed by his predecessor whose absence is only temporary, should state in his reference to the Sudder Dewanny Adawlut his reasons for supposing that the Judge who

(*l*) Cir. Ord. Cal. and West. C. 5th December, 1834.

(*m*) Reg. XXVI., 1814, Sec. 4, Cl. 2.

(*n*) Cir. Ord. Cal. and West. C, 27th November, 1835, para. 3.

(*o*) Cir. Ord. 6th September, 1843.

passed the decision will not return until after the expiration of six months from his departure.(*p*)

Sudder Court records grounds of permitting review.

The Sudder Court, if it permits the review, records on its proceedings the grounds of the permission, and issues any instructions which it may deem just regarding the admission or rejection of new evidence in the case.(*q*)

There may be appeal though review refused.

The order of a Zillah Judge or of the Sudder Court, rejecting the petition for a review in the first instance, or of the latter Court refusing to sanction a review when applied for by a lower Court, does not preclude the party from instituting a regular appeal, (if the case be appealable.)(*r*)

If the petition for a review of judgment is rejected as not containing sufficient grounds for the review desired, the petitioner is not entitled to receive back the amount of the stamp duty, paid for the paper on which the petition may have been written; but in the event of its having been written on an *ad valorem* stamp, the Court, rejecting the petition, is invested with a discretionary authority in any particular instance wherein the forfeiture of the entire stamp duty may appear excessive, on due consideration of the circumstances of the case, to order the refund from the public treasury, of any portion, not exceeding three-fourths, of the total amount.(*s*)

When the rejected petition is written on the stamp of lower value, and is found by the Court rejecting it, groundless and litigious, so as to merit a fine, the Court is authorized and required, as in the case of litigious summary appeals, to impose a suitable fine, not exceeding the amount of the stamp duty which would have been payable if the petition had been written on an *ad valorem* stamp.(*t*)

When the petition for a review of judgment is admitted, the Court reviewing the case, will, on deciding it, pass such order relative to the stamp duty paid by the petitioner, as may appear just and proper, whether for his reimbursement by the

(*p*) Cir. Ord. Cal. and West. C. 7th June, 1839, para. 2.

(*q*) Reg. XXVI., 1814, Sec. 4.

(*r*) Reg. XXVI., 1814, Sec. 4.

(*s*) Reg. II., 1825, Sec. 2, Cl. 2.

(*t*) Ibid, Cl. 3; See p. 466, Supra.

opposite party as part of the costs of suit; or for the refund of any portion of it, not exceeding three-fourths, by the Government.(*u*)

Documents filed with applications for a review of judgment are considered as exhibits, and are liable to stamp duty as such, in the same manner as if they had been filed or entered on the proceedings of the original suit, or when it was before the Court in appeal, whether regular or special.(*v*)

A petition for the review of an order rejecting an application for a review of judgment, being in fact a second petition on the same subject, is governed by the rules applicable to original petitions for review.

No stamp on second petition within 3 months from judgment.

If therefore the second petition be presented within three calendar months from the delivery or tender of the decree whereof review was sought by the first petition, it may be written on stamped paper of the value of two rupees; but if preferred after the expiration of that period, such second petition must be written on an *ad valorem* stamp.(*w*)

The presentation of a petition of review by a mooktar, is, like every other act in Court by a mooktar, an absolute nullity, and is of no avail to save the party from the consequences of not filing his petition regularly in due time.(*x*)

SECTION II.

REVIEW OF JUDGMENT BY PRINCIPAL SUDDER AMEEN.

Application to Principal Sudder Ameen himself.

ALL applications for review of judgment in suits decided by the Principal Sudder Ameen are made directly to that Officer, who proceeds as the Zillah Judge proceeds with applications for review of his own judgment, and when he recommends a review of judgment in suits below the value of five thousand

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(*u*) Reg. II., 1825, Sec. 2, Cl. 4.

(*v*) Con. 1058, Cal. C. 21st October, West. C. 18th November, 1836.

(*w*) Con. 842, Cal. C. 1st, West. C. 29th November, 1833.

(*x*) Act I., 1846. Reed *v.* Hernath Mitter, S. D. A. 17th July, 1850.

rupees, he forwards his recommendation to the Zillah Judge,(*y*) who is authorized to grant permission under the same rules as are prescribed in cases where similar applications may be made to the Court of Sudder Dewanny Adawlut.(*z*)

In suits above five thousand rupees tried by a Principal Sudder Ameen, the recommendation of a review of judgment is made by the Principal Sudder Ameen directly to the Sudder Court; and the application is dealt with in all respects as if it were an application for a review of a decision of a Zillah Judge.(*a*)

But it is to the Zillah Judge, and not to the Sudder Court, that the Principal Sudder Ameen must apply for permission to review an order pronounced by himself in appeal.(*b*)

Order of Zillah Judge is final.

The order of a Zillah Judge refusing to allow a Principal Sudder Ameen to review his judgment, is final.(*c*)

There is no review of judgment, below the Court of the Principal Sudder Ameen.

(*y*) Cir. Ord. Cal. and West. C. 23rd February, 1838, para. 7.

(*z*) Reg. V., 1831, Sec. 19.

(*a*) Act XXV., 1837, Sec. 4.

(*b*) Cir. Ord. 4th April, 1845.

(*c*) Con. 1294, Cal. C. 14th, West. C. 28th May, 1841; R. S. C. 23rd June, 1841, p. 12.

CHAPTER XXXVIII.

REGULAR APPEALS TO SUDDER DEWANNY ADAWLUT.

SECTION I.

HOW THE APPEAL IS BROUGHT BEFORE THE COURT.

Constitution of the Court.

THE East India Company's highest Court of Civil Judicature is the Court of Sudder Dewanny Adawlut. In the Presidency of Fort William, there is a Court of Sudder Dewanny Adawlut for the Lower Provinces and another for the North-Western Provinces. The former holds its sittings at Calcutta, the latter at Agra. The former at present consists of five Judges, the latter generally of three; their number is regulated from time to time according to the exigencies of the public service.

These tribunals are not only Courts of Judicature; they may also be considered as boards for superintending the administration of justice and the conduct of Judicial Officers, but it is in the former capacity alone that they fall within the scope of the present treatise.

By Regulation II., 1801, they are authorized to regulate the mode and order of their own proceedings, as well as the execution of their process, subject to the rules prescribed by the Regulations.

And by Act XVII., 1841, they may frame such rules of practice for the due exercise of the civil jurisdiction vested in them by the Regulations, as may from time to time be found requisite; the rules when framed are submitted to the Governor General of India in Council; and after receiving his approval, they are of the same force as if they had been enacted by the Legislature.

All rules of practice under Act XVII., 1841, are drawn up in English and Oordoo, and are hung up at the entrance of the Court-house for one month, to enable the public to suggest alterations or to offer objections, previous to the rules being submitted to the Supreme Government for approval.(*d*)

The Sudder Court are empowered by law(*e*) to transfer to their own file, and to try and decide any causes of the value of Sicca rupees 43,103 or upwards, which may have been instituted in a Zillah Court, but which may, in the opinion of the Sudder Court, be more conveniently or expeditiously tried by itself than by the lower Court, but this original jurisdiction is never exercised, and they are practically known only as an Appellate Court.

Where appeal lies to Sudder Court.

As a general rule, in all causes originally decided by the Zillah Judge, and in all causes of more than five thousand rupees' value originally decided by the Principal Sudder Ameen, a regular appeal lies direct to the Sudder Dewanny Adawlut,(*f*) as well from the final decision of the Courts below, as from their orders, passed in the course of execution of the decree, and from decrees of fine or forfeiture for resistance of process.(*g*)

What orders are and are not appealable.

With the exception of those cases in which special appeal is allowed,(*h*) the decisions of Zillah Judges in cases regularly appealable to them from the subordinate Courts are final, their orders in the execution of those decisions of the subordinate Courts are also final, and interlocutory orders passed by the Zillah Judges on the hearing of such appeals are not appealable to the Sudder Court.(*i*)

If a suit be decided by the Court of first instance, and afterwards be decided by the Zillah Judge on regular appeal, and if the Sudder Court on special appeal set aside both decisions

(*d*) Rules Sudder Dewanny Adawlut, 20th January, 1843.

(*e*) Reg. XXV., 1814, Sec. 5, Cl. 1.

(*f*) Reg. V., 1831, Sec. 28, Cl. 3; Con. 1148, West. C. 27th April, Cal. C. 11th May, 1838.

(*g*) Con. 780, Cal. C. 12th April, West. C. 10th May, 1833; Supra, p. 174.

(*h*) Infra, Chap. XL.

(*i*) Rules Sudder Dewanny Adawlut, 13th December, 1833; Reg. V., 1831, Sec. 28; Reg. VII., 1832, Sec. 7.

as incomplete, and if the Zillah Judge then decides the case himself without further reference; the appeal to the Sudder Court from his decision, is considered as an appeal from a judgment in an original suit, and is admissible as a matter of course.(*j*)

Petition presented to Court of first instance.

By recent enactments(*k*) it has been prescribed that

1. Every petition of regular appeal, in a case appealable to the Sudder Court, and decided after the 15th February, 1850, shall be presented to the Court in which the decision was passed, within six weeks from the day of the decision: such petition of appeal shall contain only notice that the party, being dissatisfied with the judgment, is desirous of appealing from it.

Proceedings certified to Sudder Dewanny Adawlut.

2. The proceedings held in the cause of appeal shall be certified to the Sudder Dewanny Adawlut as soon as conveniently may be done, and notice thereof in writing shall be given to the appellant. This notice may be given by an intimation affixed in the Court-house of the Sudder Dewanny Adawlut, or in such form and manner as the Court shall order, by a rule to be framed under Act XVII., 1841.

Appellant to file reasons of appeal in three months after they are certified.

3. Within three months after receipt of such notice, the appellant shall present to the Sudder Dewanny Adawlut, the specific objections to the judgment and detailed reasons for preferring the appeal; otherwise it shall be dismissed, unless he shall show reasonable cause to the satisfaction of the Sudder Court for his default.

SECTION II.

PROCEEDINGS IN ABSENCE OF RESPONDENT.

Court may confirm or remand.

THE Sudder Court, or a single Judge of it, may, without summoning the respondent, confirm the decision or remand the case, just as a Zillah Judge does.(*l*)

(*j*) R. S. C. 6th July, 1842, p. 34.

(*k*) Act IV., 1850, amended by Act XXX., 1850. As to Paupers, see Chap. XLV., Infra.

(*l*) Supra, p. 441; Reg. IX., 1831, Sec. 2, Cl. 2; Rules Sudder Dewanny Adawlut, 20th February, 1835.

Petitions of regular appeal are commonly submitted in the first instance to the Judge, who has undertaken, for the current month, the duties of what is called the miscellaneous department. This Officer sometimes remands the case at once, where it is perfectly manifest that a re-trial is necessary; but he seldom, if ever, confirms at this stage the decision of the Court below. He generally directs the respondent to be summoned, and passes on the cause into the list of regular appeals, to be tried when its turn comes.

The Court, or a single Judge, may call for the proceedings of the lower Court, or such parts of them as may appear necessary, and may further order a report on any points requiring explanation, prior to passing a determination on the case, or matter in appeal.(*m*)

A Judge thus confirming the decision of the lower Court, may, previous to signing his judgment, provide for the submission of the case to another Judge.(*n*)

SECTION III.

PROCEEDINGS WHERE RESPONDENT IS CALLED UPON.

THE procedure of the Sudder Court is, generally speaking, and as nearly as circumstances will allow, the same with that of the Zillah Court.(*o*)

Process directed to Zillah Court.

All process, rules, and orders, which are to be served or executed on any parties, witnesses, or persons, (exclusive of the parties, Vakeels, or persons in actual attendance on the Court,) are directed to the Court of the Zillah in which the cause of action shall originally have arisen, or in which the lands may be situated, or the parties may be or reside. Every such pro-

(*m*) Reg. IX, 1831, Sec. 2, Cl. 3; Con. 675, 17th February, 1832; Con. 839, West. C. 11th October, Cal. C. 8th November, 1833.

(*n*) Reg. IX., 1831, Sec. 2, Cl. 6; Sel. Rep. 29th November, 1834, v. 5, p. 369.

(*o*) Reg. VI., 1793, Sec. 7, Benares; Reg. X., 1795, Sec. 2, Ced. and Conq. Prov.; Reg. V., 1803, Sec. 7.

cess, rule, and order limits a certain time in which it is to be served, executed, and returned to the Sudder Court.(p)

The Court to which the process may be directed, is to return it so executed within the time limited, or render good and sufficient reason why it has not been served or executed.(q)

Powers of single Judge.

A single Judge of the Sudder Court may, in general, and for most purposes, exercise the whole power of the Court. But when a single Judge, trying a case in appeal, regular or special, from any subordinate Court, is of opinion that the decision appealed from ought to be reversed or altered, he must call in two other Judges of the Court to sit with him, and the appeal is then heard by the three Judges sitting together, and is decided by them without any additional voices. In such cases the decree or final order is signed by the three Judges, if they agree; but, if one of them dissent from the view taken by the majority, by the two Judges who agree; and the signature of the third Judge is not considered requisite, but his opinion is recited in the decree or final order.(r)

He cannot reverse original decision.

This rule is not applicable to summary appeals, or to appeals in miscellaneous cases; nor is it held to interfere with the powers of a single Judge to confirm or remand.(s)

Three Judges usually sit to hear regular appeals.

It is the practice at present for three Judges to sit together to hear regular appeals, and this is a just and fair arrangement, since it is not right that suitors should be harassed and the public time wasted by two trials instead of one; that causes should be gone through and argued before a tribunal which has not full power to pronounce, at the conclusion of the argument, any decision which justice may require.

It may be worth while to mention, although the point is of no practical importance under the system at present pursued, that a difference between the higher and the lower tribunal as to some of the reasons of the decree of a lower Court, while there

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(p) Reg. VI., 1793; Reg. II., 1833.

(q) Reg. VI., 1793, Sec. 14, Benares; Reg. X., 1795, Ced. and Conq. Prov.; Reg. V., 1803, Sec. 14.

(r) Act II., 1843, Sec. 1.

(s) Act II., 1843, Sec. 2; Supra, p.

is agreement as to others, does not constitute the difference of judgment, which requires a single Judge thus partially differring with the Judge of the Court below, to refer the case for the decision of a full Court; he cannot be considered as practically dissenting unless he proposes to alter the decree.(*t*)

Judge may on consent alter original decree.

Where a single Judge found part of a judgment of the lower Court untenable, and concurred in the rest; the party benefitting by such untenable part having consented, a final judgment was passed, which amounted in effect to an amendment of the original decree.(*u*)

In a case, in which a *razeenamah* and *soolehnamah* were executed by both parties, a decision in conformity therewith, although in reversal of the judgment of the lower Court, was passed by a single Judge of the Sudder Court.(*v*)

In both these cases, the jurisdiction of the single Judge to alter the decree of the lower Court was derived from the consent of the parties.

It seems necessary here to notice, though the subject does not admit of very methodical statement, the general powers of a single Judge of the Court, and the course pursued when the Judges differ in opinion.

A single Judge may exercise all the powers of the Court.

It may be laid down, as a general rule, subject to several exceptions, one of which has been already stated,—that all the powers of the Sudder Dewanny Adawlut may be exercised by a single Judge.(*w*)

Cannot decide appeal from his own judgment.

The sitting Judge may not determine, on the admission or rejection of any application for appeal, whether regular or special, if the judgment or order appealed from was passed by himself in the Court below.(*x*) Nor indeed can any Judge of the Sudder Dewanny Adawlut sit upon the trial of an appeal from a judgment or order passed by himself.(*y*)

(*t*) Sel. Rep. 16th January, 1846, v. 7, p. 223.

(*u*) Sel. Rep. 25th September, 1833, v. 5, p. 328.

(*v*) Sel. Rep. 19th April, 1845, v. 7, p. 202.

(*w*) Reg. II., 1801, Sec. 6; Reg. XIII., 1810, Sec. 4; Reg. IX., 1831, Sec. 2, Cl. 1; Reg. VII., 1832, Sec. 15.

(*x*) Reg. XIII., 1810, Sec. 8, Cl. 2.

(*y*) Ibid, Sec. 6, Cl. 4.

But if a Judge passes a decree for land and wasilat, but does not fix the amount of wasilat, and is then promoted to the Sudder Court—if in the execution of the decree a question arise as to the amount of wasilat, the Judge who passed the decree below is not precluded from passing his judgment upon the question of wasilat.(*z*)

The sitting Judge may perfect interlocutory decrees and orders passed by himself in conformity with Section 2, Regulation XIII., 1810, or by any other Judge or Judges in pursuance of the Regulations in force. But it is not in any case competent to a single Judge to reverse or alter the decree or order of any other Judge, or Judges of the Court.(*a*)

A single Judge, in any case of difficulty or importance, in which he may deem it expedient and proper that the matter at issue should be decided by two or more Judges of the Court, may record his own opinion thereon and refer the case to another Judge.(*b*)

Reference by one Sudder Court to a Judge of the other.

If only one Judge is present in the Sudder Dewanny Adawlut of the North-Western Provinces, or if a difference of opinion should arise when only two Judges are present, in any matter requiring the concurrent voices of two Judges, the question is referred to the determination of one of the Judges of the Calcutta Court.(*c*)

Whenever there are four Judges and no more present at the Court at Calcutta, if there be an equality of voices in cases which require a decision by the majority, the Court may, in like manner, refer the question for decision to a Judge of the Sudder Court in the Western Provinces.(*d*)

Judge referee may decide without summoning the parties.

In such cases, it is sufficient that the Judge to whom the point is referred should form and record his judgment on a careful perusal and consideration of the proceedings, and without requiring the attendance of the parties or their Vakeels.(*e*)

(*z*) Con. 407, 13th March, 1829.
(*a*) Reg XIII., 1810, Sec. 4.
(*b*) Reg. IX., 1831, Sec. 2, Cl. 6.
(*c*) Reg. VI., 1831, Sec. 7, Cl. 1.
(*d*) Reg. IX., 1831, Sec. 9.
(*e*) Reg. VI., 1831, Sec. 7, Cl. 2.

The cases in which new evidence may be received in appeal have been already stated in general terms.(*f*)

Sudder Court may examine witnesses.

The Sudder Dewanny Adawlut is empowered "in cases of appeal, in which it shall appear to them that the original suit has not been sufficiently investigated in the lower Court, or for any other cause that may be deemed reasonable by the Court, either to receive such further evidence as they may think necessary for the just determination of the suit, and to give judgment upon it; or to refer the suit back to the Court in which it originated, accompanied by such special directions to the Court with regard to the new evidence they are to receive respecting it, as may be deemed by the Court most conducive to justice, and the convenience of the parties and witnesses. But in every case in which the Sudder Dewanny Adawlut may exercise this power, they are to enter upon the record of the trial their reasons for having exercised it. In cases in which the Court may judge it proper to receive such further evidence themselves, they are empowered, according as they may deem most conducive to justice, (respect being had to the nature of the cause and the evidence) either to examine the witnesses to be produced, *vivâ voce*, in open Court, first causing the witnesses to be sworn, and their depositions to be reduced in writing, and signed by the deponents respectively; or to authorise their Register to swear the witnesses and take their depositions, and to cause the deponents to sign them, and to authenticate them with their signatures. The Register in such case is to examine the witnesses in the presence of both parties, or of their Vakeels, who are to be at liberty to put any questions to the witnesses that they may think proper, and the questions, with the answers to them, are in the same manner to be reduced into writing, signed, and authenticated. But if due notice be given to the parties or their Vakeels, of the examination of any witness or witnesses before the Register, and he or they shall not attend at the

(*f*) See Supra, p. 452, and Benee Suhaee *v.* Hurkishendoss, 2 Knapp, P. C. C. 255.

time of the examination, the Register is to proceed in the examination as before directed, and the depositions are to be received as good and authentic evidence."(*g*)

The rules as to the examination of women of rank, and of absent witnesses, and as to recusant or contumacious witnesses, are the same with those which have been already set forth.(*h*)

Court may re-examine witnesses who were examined before a single Judge.

But(*i*) the Court, at large, or any two Judges of the Court, may re-examine witnesses whose depositions may have been taken before a single Judge, if it appear requisite; may examine any other witnesses in the cause; and pass any order that may appear proper and consistent with the Regulations, whether in addition to, or in qualification, or abrogation of, any previous order of a single Judge.(*j*)

These powers, however, are rarely exercised.

Decrees of Sudder Court.

It has been resolved(*k*) that the decrees of the Sudder Court shall not contain abstracts of the pleadings and of the proceedings of the lower Court; but shall only give (in addition to the recorded judgment of the Court) the dates and other particulars of the decrees appealed against, the names of the parties in the lower Court, a short statement of the claim, the pleadings filed by appellant in person, or by pleader, with the name of the pleader.

What decrees are final.

The decrees of the Sudder Court are final in all suits whatever, except where the value of the matter in dispute amounts to the sum of ten thousand Company's rupees at least; in which case the parties may appeal to the Queen in her Privy Council from decrees, but not from interlocutory orders of the Sudder Court.(*l*)

Punishment of litigious appeals.

The Sudder Court, in all cases wherein it may confirm the decree of a Zillah Court, is authorized to punish appeals which may appear litigious, by a fine to Government, proportionate

(*g*) Reg. VI., 1793, Sec. 16.

(*h*) Supra, Chap. XXII.

(*i*) Reg. XIII., 1810, Sec. 4, Cl. 4.

(*j*) See Reg. I., 1807, Sec. 7.

(*k*) Resolution 5th April and 3rd May, 1850.

(*l*) Reg. VI., 1793, Sec. 29; See Civil Guide, p. 840; R. S. C. 29th June 1840, p. 45.

to the condition of the party and the circumstances of the case: this power, however, has not been exercised of late years.(*m*)

Appeal from decree on award.

If a petition of appeal be preferred against the decision of a Zillah Court founded on an award of arbitration, it is to be dismissed with costs at the hearing, unless it be fully proved to the satisfaction of the Court, by the oaths of two credible witnesses, that the arbitrators have been guilty of gross corruption, or partiality, in the cause in which they made the award.(*n*)

The appeal is, however, in the first instance, admitted on the file without any preliminary proof of corruption or partiality.(*o*)

Should the charge not be proved and the appeal be dismissed, interest should be awarded from the date of the decree of the Court below.(*p*)

The order of a Zillah Judge for the execution of a private award of arbitration is not open to appeal. The award can only be set aside on proof, in a regular suit, that the arbitrators have been guilty of partiality or corruption.(*q*)

On any case being decided in the Sudder Court, in which the Government is a party, there is added to the order a note specifying the amount due to the Government Pleader, to afford that Officer the means of recovering his fees.(*r*)

Return of Stamp duty.

Where a portion or the whole of the value of the stamp is returnable to the parties, the treasurer of the Court pays it to the Vakeel, if he be authorized to receive it by a special clause in his vakalutnamah; otherwise it remains in deposit

(*m*) Reg. XIII., 1796, Sec. 3; See Supra, pp. 466, 471; Con. 1096, Cal. and West. C. 7th July, 1837.

(*n*) Reg. V., 1793, Sec. 28, Benares; Reg. VIII., 1795, Sec. 6, Ced. and Conq. Prov.; Reg. IV., 1803, Sec. 28; Supra, pp. 303, 306.

(*o*) Con. 48, 18th September, 1809; Sel. Rep. 19th May, 1809, v. 1, p. 288.

(*p*) Sel. Rep. 17th November, 1810, v. 1, p. 312.

(*q*) Sel. Rep. 8th January, 1820, v. 3, p. 4.

(*r*) Rules S. D. A. 8th August, 1834. As to suits against Officers of Government, see Reg. II., 1814, and pp. 18, 142, 203, Supra.

until the party applies to the Court for an order for payment.(s)

Duties of Vakeel.

Vakeels of the Court are held responsible for the correctness of all representations made by them to the Court.(t)

Vakeels are required to write on all petitions presented by them in cases or matters which are pending before, or belonging to, any particular Judge, the name of the Judge, in order that it may be referred to him direct.(u)

Fine for inadequate stamp.

It is enacted by Regulation X., 1829, that every Vakeel attached to any Court of Judicature, who shall present, for the purpose of being filed or recorded any paper, petition, or any deed, instrument, or document, required by law to be stamped,—on unstamped paper, or on paper not bearing the proper stamp, and not duly endorsed, or on paper bearing a counterfeit stamp, unless signed and endorsed by a vendor as prescribed; shall forfeit five times the amount of the stamp, which ought to have been used, or five times the difference in case of the use of improper stamps. The fine to be imposed and levied by the presiding Officer of the Court in which the Vakeel may be practising, and the amount to be remitted to the Collector, with a copy of the proceeding or order imposing the fine.(v)

Petitions of plaint, and of appeal, regular and special, and applications for review of judgment, are included in this enactment;(w) and it is imperative upon judicial Officers to enforce its provisions, even where a stamp of inadequate value is filed under circumstances, which leave no doubt that the party filing it was ignorant of the defect.(x)

Courts to fine persons guilty of contempt.

Any person, whether generally amenable to the Courts of the East India Company or otherwise, using menacing gestures or expressions, or otherwise obstructing justice in the

(s) Rules Sudder Dewanny Adawlut, 3rd January, 1834.

(t) Rules Sudder Dewanny Adawlut, 8th June, 1842.

(u) Rules Sudder Dewanny Adawlut, 8th August, 1834.

(v) Sec. 18, Cl. 1.

(w) Cir. Ord. 20th January 1843.

(x) Con. 1120, Cal. C. 15th December, 1837, West. C. 12th January, 1838.

presence of any superior or inferior Court of the East India Company, is liable to be fined by the authority whose proceedings are obstructed, to any amount not exceeding two hundred rupees, or in case such fine be not paid, to be imprisoned for any period, not exceeding one month. He may appeal from this sentence within one month to the authority appointed by law to hear appeals, generally, from the decisions of the Officer by whom the fine was imposed.(*y*)

(*y*) Act XXX., 1841, and See Reg. IV., 1793, Sec. 21.

CHAPTER XXXIX.

SUMMARY APPEALS AND APPLICATIONS IN THE NATURE OF SUMMARY APPEAL TO THE SUDDER COURT.

SECTION I.

SUMMARY APPEALS.

From what orders summary appeal will lie.

THE Sudder Court may receive a summary appeal from the orders or decrees of a Zillah Court, or in cases above five thousand rupees in value, from the Court of a Principal Sudder Ameen, whenever any of those Courts may have refused to admit an original suit or appeal, regularly cognizable by them, or having admitted such suit, or appeal, may have dismissed it on the ground of delay, informality, or other default, without an investigation of the merits of the case.(*z*)

The summary appeal must be preferred within the period prescribed for regular appeals, and subject to the provisions already detailed, in speaking of summary appeals to the Zillah Court.(*a*)

Inquiry into facts.

The Court, when hearing summary appeals, frequently requires parties to substantiate their assertions by the evidence of witnesses.

In such cases(*b*) it records a roobukaree, authorising the party to prove any allegation which he may deem important; and he presents to the lower Court a copy of this roobukaree, along with a petition praying that it may be carried into effect.

(*z*) Reg. XXVI., 1814, Sec 3, Cl. 2.
(*a*) Ibid, Cl. 5, Supra, Chapter XXXVI
(*b*) Cir. Ord. 28th March, 1845

It is then the duty of the Court below, without requiring any express orders, to take the depositions of the witnesses who may be produced and to record its opinion, as to whether the point in question has been proved or not, allowing the applicant to take an authenticated copy of the minute recorded.(c)

Summary appeals from appealable interlocutory orders passed by the Zillah Judge, or in suits above five thousand rupees by the Principal Sudder Ameen, lie to the Sudder Dewanny Adawlut.(d)

Default.

Where an appeal has been dismissed by any Court under Act XXIX., 1841, on the ground that the appellant has made default by neglecting to proceed in it within due time, no appeal lies against the order of dismission, other than a summary appeal on the fact of default. It would seem that if the appeal so dismissed be a summary appeal, which has been referred by the Zillah Judge to the Principal Sudder Ameen, the appeal would lie direct from the Principal Sudder Ameen to the Sudder Court, like the summary appeal from any other judgment passed in appeal by the Principal Sudder Ameen.

SECTION II.

REFERENCE OF ORIGINAL SUITS OR PETITIONS BY THE SUDDER TO THE ZILLAH COURT.

THE Sudder Court may receive any original suit or complaint which may be cognizable in a Zillah Court, and may, by precept, command the Judge of such Court to receive the suit or complaint, and to proceed to hear and determine it, if it be proved to the satisfaction of the Sudder Court that the Judge refused or omitted to proceed in it. If the plaintiff shall refuse or neglect to proceed in the suit or complaint, for

(c) Cir. Ord. 28th March, 1845.
(d) Cir. Ord. 2nd February, 1849.

the period of six weeks after the lower Court has received the precept and has notified it to the complainant, the Judge dismisses it, notwithstanding the precept; and certifies the dismissal and the ground of it within a week to the Sudder Court.(*e*)

The Sudder Court has authority to receive any petitions respecting suits or matters that may be depending or have been decided, in any Zillah Court, and if it be proved that the petition was presented to the Judge of such Court and that he refused or omitted to receive it, and to proceed on it, the Court may issue a precept commanding the Judge to receive the petition, and to proceed respecting it according to the Regulations.(*f*)

(*e*) Reg. VI., 1793, Sec. 4, Cl. 1.
(*f*) Reg. II., 1798, Sec. 7.

CHAPTER XL.

SPECIAL APPEALS TO THE SUDDER COURT.

A SPECIAL appeal lies to the Sudder Court from all decisions passed on regular appeal in the subordinate civil Courts which shall appear to be inconsistent with some law or usage having the force of law, or some practice of the Courts, or shall involve some question of law, usage, or practice, upon which there may be reasonable doubts.(*g*) From what decisions it lies.

Applications for special appeal are not admitted unless they are presented to the proper Court within the period limited for the presentation of regular appeals.(*h*) Within what time.

Where an appeal from a judgment affecting the interests of Government was admitted after a lapse of five months and thirteen days from its date, the appellant was allowed to justify the delay by the necessity of reference to the superior functionaries of Government.(*i*)

The petition is written upon the stamped paper prescribed in Regulation X., 1829,(*j*) with reference to the value or amount of the suit. It must state distinctly the specific ground or grounds, on which the special appeal is solicited, and must be presented either by the party in person, or by an authorized pleader of the Court. In the latter case the petition is signed by the pleader, who certifies on the back of the petition, that he has duly considered the grounds stated for admitting a special appeal, and that he believes them to be well founded and sufficient.(*k*) Stamp on petition. Certificate of Vakeel.

(*g*) Act III., 1843, Sec. 1.
(*h*) Ibid, Sec. 2.
(*i*) Sel. Rep. 30th September, 1833, v. 5, p. 331.
(*j*) See Reg. I., 1814, Sec. 14.
(*k*) Reg. XXVI., 1814, Cl. 3.

As a general principle, the Court will not consider, as a sufficient ground for the admission of a special appeal, any plea urged upon the ground of mere informality or departure from the law of procedure occurring in the Court of first instance, unless the same shall have been urged in the Court of first appeal, and unless the certificate endorsed on the petition shall specify that such plea was urged in and rejected by such Court.(*l*)

What the vakalutnamah must specify.

Parties engaging pleaders to present applications for the admission of special appeal, must distinctly state in their vakalutnamahs, whether the pleader is merely to make the preliminary application, or to conduct the case to its final issue.(*m*)

What should accompany petition.

Every application for a special appeal ought to be accompanied by copies of the several decrees previously passed on the case.(*n*) It is considered to be so accompanied, if the documents in question be exhibited within the period allowed for the presentation of regular appeals.(*o*)

What exhibit fee is leviable.

In applications for special appeal no exhibit fee is leviable on documents filed with the petition until the appeal is admitted, when the fee is levied on such documents as are put on record in the proceedings.(*p*)

On the special appeal being admitted, the exhibit fees due under the general Regulations are to be paid within six weeks on all papers (whether copies or original) not on the record of the case appealed.(*q*) In the event of failure of payment, the case will be dealt with as any other case of default.(*r*)

How notice is given to respondent.

The Sudder Dewanny Adawlut of Calcutta has recently passed a rule,(*s*) that the Native Deputy Register shall prepare weekly lists of applications which have been filed during

(*l*) Res., Sudder Dewanny Adawlut, 16th July 1847.

(*m*) Rules, Sudder Dewanny Adawlut, 25th November, 1842.

(*n*) Act III., 1843, Sec. 3.

(*o*) Cir. Ord., 23rd May 1845, para. 1.

(*p*) Con. 961, West. C. 26th June, Cal. C. 7th August, 1835.

(*q*) Rules, Sudder Dewanny Adawlut, 7th May, 1841.

(*r*) Ibid.

(*s*) Resolution of Sudder Dewanny Adawlut, 16th August, 1850.

the week for the admission of special appeals, and the dates on which such applications are likely to be brought on for hearing, and shall transmit extracts from such lists to the Courts in which the decisions on regular appeal were passed, with a view to such extracts being affixed in the respective Court-houses, to enable the holders of the decrees in question to be present personally or by Vakeel at the hearing, should they desire it. The time to be fixed for the hearing shall ordinarily not be less than six weeks from the date of the despatch of the lists by the Native Deputy Register from the Sudder Court. The Native Deputy Register shall, every Saturday, affix in the Court-house a list of the applications for special appeal which, as having been filed for more than six weeks from the date of dispatch of the lists as above provided, will be ready for hearing during the week following.

Hearing of petition.

The Act by which special appeals are at present regulated, directs(*t*) that every application for a special appeal duly presented shall be heard by a single Judge of the Court in presence of the special appellant, or his Vakeel or agent, and the Judge may at his discretion call for and peruse any document forming a part of the record of the cause, and summon the opposite party to answer the application.

Order of rejection.

If it appears to the Judge that a special appeal is not admissible under the definition lately given, he rejects the petition for special appeal, and his order is final.(*u*)

Effect of rejection on stamp duty.

The appellant is not in this case entitled to receive back the amount or value of the stamp on which the petition was written; the Courts are, however, vested with a discretionary authority, in any particular instance of hardship, to refund any portion not exceeding three-fourths of the amount of such duty to the party who paid it, or to his legal representative.(*v*)

(*t*) Act III., 1843, Sec. 4.

(*u*) Act III., 1843, Sec. 6.

(*v*) Reg. XXVI., 1814, Sec. 2, Cl. 5.

Admission of appeal.

If it appears to the Judge that a special appeal is admissible, he passes an order accordingly, and at the same time reduces the point or points to be determined to writing in English in the form of a certificate, which is translated into Oordoo; and the special appeal is then brought on the file of the Court to be heard and determined in due course. It is not necessary to call for or refer to any part of the proceedings, the reading of which is not required for deciding the point or points of law stated in the certificate.(*w*)

Certificate recorded by Judge.

Court restricted to points recorded.

In cases thus admitted, the Court determines the point or points so certified, and no other point or part of the case whatever.(*x*)

A special appeal ought not to be admitted upon a ground not set forth in the petition; and if admitted it will be dismissed with costs at the hearing.(*y*)

But if the decree be not sufficiently minute to enable the petitioner for special appeal to state his objection in detail; an objection not very definite in itself, but capable of being reduced to certainty by inspection of the record at the hearing of the petition, will afford ground for the admission of a special appeal, and for framing a certificate more definite than the objection, but coming within its general scope and purport.(*z*)

The certificate must be specific. It is erroneous if it rests merely upon a general objection to the whole judgment, as open to doubt and suspicion.(*a*)

How far certificate may be amended.

When, however, the special ground of appeal has been incorrectly and incompletely certified, the Court may amend the certificate; but such amendment must relate only to the point or points originally stated in the certificate, and it is not lawful for the Court to receive or add any new point or points.(*b*)

(*w*) Act III., 1843, Sec. 5.

(*x*) Ibid, Sec. 7; S. D. 1849, August 9, p. 344.

(*y*) S. D. 1847, February 24th, p. 63.

(*z*) S. D. 1847, June 21st, p. 276.

(*a*) S. D. 1849, July 29th, p. 304.

(*b*) Act III., 1843, Sec. 8; S. D. 1847, 18th August, p. 447; S. D. 1849, 9th August, p. 351; Ibid, December 6th, p. 437; Ibid, 8th November, p. 428.

But they may amend the certificate by striking out any ground of admission which is manifestly erroneous, such as a general objection to the whole judgment.(c)

Causes consolidated in appeal.

Six different actions having been instituted, for as many villages, to set aside a single deed of conveyance of the whole, and having been decided together by the Courts of original jurisdiction and of first appeal, the Sudder Dewanny Adawlut allowed the cases to be consolidated, and admitted one special appeal from the six decrees.(d)

Where special appeal lies from judgment of Zillah Court on summary appeals.

A special appeal lies to the Sudder Court against judgments pronounced by the Zillah Courts on summary appeal from interlocutory orders passed by a Moonsiff, or a Sudder Ameen, or (in cases below five thousand rupees) by a Principal Sudder Ameen, regarding the valuation of suits; but the order of the Zillah Court on summary appeal from all other appealable interlocutory orders of subordinate Courts, is final.(e)

And there is a similar appeal in miscellaneous cases; that is, in occasional and incidental matters which arise in the course of executing decrees passed in regular suits.

Admission and remand where special appeal not regularly admissible.

The Sudder Court is in the habit of applying the law of remand (f) to cases which come before it on petition for special appeal, but which do not exhibit any of the grounds upon which alone special appeal is by the Act now in force,(g) declared admissible: the Court in such cases beneficially, if not regularly, admits the appeal, for the purpose of remanding the suit, in order that justice may be done.

Observations on the law as to the admission of special appeals.

The present state of the law upon this subject can scarcely be deemed satisfactory.

The absolute power of rejecting, at once and for ever, appeals involving the most delicate questions of law and judicial policy, is vested in a single Judge, and it is not even made part of his duty to state his reasons for rejection.

(c) S. D. 1849, 26th July, p. 304.

(d) R. S. C. 3rd June, 1835, p. 8.

(e) See Supra, p. 465; Cir. Ord., 2nd February, 1849.

(f) Supra, p. 443.

(g) Act III., 1843.

Upon the other hand, if he admits the appeal, he is bound to give his reasons; and if, in the necessarily cursory view which he takes of the case in this early stage, he has omitted to notice any ground of appeal, the point, however important, cannot be afterwards discussed, and the Judges who finally hear the appeal must dispose of it irrespectively of what they (with the advantage of a full consideration of the case) may strongly feel to be its real merits.

Present practice as to hearing petition of special appeal.

The Act speaks only of a single Judge sitting to decide whether petitions of special appeal shall be admitted or not, but it has not been considered by the Court that the enactment prevents a larger number of Judges from sitting together to entertain these applications; and they have adopted the very judicious practice of hearing petitions for special appeal in a Court composed of two or more Judges.

It is very desirable that the enactment requiring of the Court at this very early stage a certificate of points out of which they must not afterwards travel, should be absolutely repealed, and the whole case left open for discussion upon the merits.

The power of rejection, too, appears far too important a judicial function to be exercised without assignment of reasons.

Facts are to be assumed as stated in decree.

In considering applications for the admission of a special appeal, the Court is bound to assume all the facts of the case as stated in the decree of the Court below; and it has been ruled that a special appeal cannot be admitted to reverse an error in the determination of facts, even where the judgment may appear to be manifestly without, or contrary to, evidence.(*h*)

Distinction between regular and special appeal.

It will be evident, from what has been already stated, that the object of special appeal is very different from that of regular appeal.

Objects of regular appeal.

In regular appeal the object is to enable suitors, who are dissatisfied with the decision of the Court of first instance, to lay the whole merits of the case before a higher tribunal.

(*h*) Reg. XXVI., 1814, Sec. 2, Cl. 1; Con. 246, 1st May, 1816; Act III., 1843, Sec. 9.

Objects of special appeal.

The law has not provided machinery for a third trial of the case upon the merits at large. But it has created, under the head of special appeal, a certain superintending authority, which does not, like the jurisdiction on regular appeal, propose to itself the examination of the correctness or incorrectness of the conclusion which the Court below has adopted as to the merits of the case; but which exists solely for the purpose of maintaining uniformity in the law and in the decisions of the Courts.(*i*)

Province of the lower Courts.

To the lower Court belongs the task of inquiring into the truth of facts, and of declaring what are the relative rights accruing from those facts to the parties litigant.

If there be miscarriage in the discharge of these functions there ought to be a revision.

Where error is perceptible in the mode of inquiry, the usual remedy is, as has been already stated, a remand.

Ground of special appeal.

The grounds of special appeal are, that the decision amounts to a violation of some law, or usage having the force of law, or some practice of the Court; or that it involves some question of law, usage, or practice upon which there may be reasonable doubts.

What mistakes as to evidence lead to special appeal.

There is a violation of law, usage, or judicial practice when evidence is irregularly admitted or rejected, when the legal effect of evidence is misconceived, and when, in consequence of such misconception, there is a misdirection as to the evidence to be adduced; and special appeals are admitted on all these grounds.

Mistakes as to law.

So there is a violation of law, usage, and judicial practice, if the whole property of a Hindoo who has died intestate, leaving sons and daughters, be awarded to his daughters by the decree; or if the sentence be contrary to some Act or Regulation, such as the law of Limitation;(*j*) or has been pro-

(*i*) See the article "Cassation" in the "Dictionnaire de Procedure Civile et Commerciale" of M. Bioche, 1847; and "Les Codes" by MM. Teulet and Loiseau, 1846.

(*j*) S. D. 1849, 5th July, p. 269; 2nd August, p. 322.

nounced in the absence of some person materially interested, and who ought, according to the practice of the Courts, to have been a party to the suit;(*k*) or if it gives to a man more than he has sought by his plaint;(*l*) or if it awards the disputed property to a stranger who has never claimed it;(*m*) or if it is wholly inconsistent with itself, as where defendants were decreed to pay a debt contracted by their brother, on the ground of the family being undivided and the money having been applied to the benefit of the family generally; but the decree at the same time allowed them to sue for the recovery of the sum so adjudged, from the estate of their brother.(*n*)

Error in procedure.

So where the Judge decides without reference to an award of arbitration;(*o*) or if his decision gives effect to an engagement tainted with champerty;(*p*) or if the Judge of first appeal frames his judgment without adverting to the rules by which appeal decisions ought to be governed;(*q*) or awards final damages on the scale fixed by a particular enactment, after the lapse of the period within which the penalty ought to have been sued for;(*r*) or awards costs upon a principle not sanctioned by the law;(*s*) or admits, and proceeds upon, a second supplementary plaint contrary to the Regulations.(*t*)

But if a supplementary pleading, though irregularly admitted, was wholly superfluous, and all that has been done upon it may be rejected without invalidating the judgment, a special appeal will not lie on the ground of such irregularity;(*u*) for it has been resolved that a plea founded on a mere informality, or departure from practice in the lower Courts, (such informality or irregularity, not affecting the decretal order,) is not a sufficient ground for the admission of a special appeal.(*v*)

(*k*) S. D. 1849, 10th May, p. 144; 21st June, p. 246.
(*l*) S. D. 1847, 21st August, p. 458.
(*m*) S. D. 1849, 10th May, p. 142.
(*n*) Sel. Rep. 14th August, 1817, v. 2, p. 247.
(*o*) Con. 499.
(*p*) S. D. 1849, 9th August, p. 340; Supra, p. 37.
(*q*) Supra, p. 454.
(*r*) S. D. 1849, 10th May, p. 147.
(*s*) S. D. 1849, 1st November, p. 418.
(*t*) S. D. 1849, 26th July, p. 304.
(*u*) S. D. 1849, 16th August, p. 352.
(*v*) Resolution of Sudder Dewanny Adawlut, 24th December, 1847.

Excess of jurisdiction.

The law is violated and a special appeal lies, wherever the Judge of the Court below has exceeded his power: when he has done that which the law forbids or does not permit him to do, or refuses to do what the law orders him to do; as where a Moonsiff or Sudder Ameen decides a suit involving the validity of lakhiraj tenure,(*w*) or refuses to examine a witness legally tendered for examination.

What violation of a written law will justify special appeal.

If the allegation of the appellant be that the lower Court has passed a decision contrary to some written law, the violation must be clear and express; it must be in contravention of the text and not merely of the preamble of the law, and the violation must be in the order actually made, and not merely in the reasoning of the Judge.

Test of accuracy of first judgment.

In order to judge whether the decision impugned is contrary to law, the Court of Appeal takes, as proved, the facts found by the judgment which is attacked. Its office is to examine whether the judgment rightly applies the law to those facts; and if it finds the contrary to be the case, it reforms the judgment.

What facts are taken as proved.

When it is said that the Sudder Court will take, as proved, the facts found by the Court below, this is to be understood of the findings of fact of the Court below, on issues of fact, contested before it.

The Sudder Court will not take upon itself to review the judgment of the Court below as to the effect of evidence of facts, relevant to the correct and true issues in a cause: and a decision resting upon the Judge's belief of the evidence adduced before him, cannot be interfered with on special appeal.(*x*)

Where issues erroneously fixed.

If, however, the issues of fact have been fixed erroneously, and not so as to enable the Court to deal with the points of law which the case presents, the Court of Appeal will interfere for the purpose of having a correct settlement of the issues of

(*w*) Supra, Chap. XV., and see pp. 131, 133; Con. 499, 27th March, 1829.

(*x*) S. D. 1850, 2nd May, p. 170.

fact, upon which the questions of law may be afterwards argued.

And if the Court of first instance has selected and tried the right issues, but the lower Appellate Court has disposed of the case on wrong issues, the Sudder Court will admit a special appeal.(*y*)

Special appeal on legal effect of facts found.

When the lower Court decides that certain facts which it finds to be proved, constitute such and such a contract between the parties, or have such and such a legal effect, the justness of this conclusion may be examined by the Sudder Court. The facts indeed are taken to be true, but the higher Court will judge for itself of their legal effect.

Thus a special appeal will lie, if the judgment, having recognized in fact the existence of all the constituent elements of a contract, has refused to give it the qualification and the effects which the law gives to such a contract; as for instance, if the judgment finds, as matter of fact, that one of the parties had engaged to deliver to the other, and that the other had accepted, a certain article for a stipulated price, and then goes on to treat this contract as a hiring, and not as a sale.

So, if the judgment of the Court below has materially misdescribed any legal proceedings or any compromise that has been relied upon, or if it has treated as a will, a document which only amounts to a donation *inter vivos*; a compromise or adjustment as an abandonment of claim;(*z*) or if it has put a wrong construction on a marriage contract or other legal instrument,(*a*) or has wrongly decided that some form was sufficiently complied with, or has erroneously declared a sentence of arbitrators to be null as having been carried beyond the terms of the submission.

Error must be in the order itself.

There is no special appeal merely because a reason has been assigned which is bad in law, if it be not necessary to

(*y*) S. D. 1849, 16th August, p. 349.

(*z*) Supra, p. 310.

(*a*) S. D. 1850, 27th June, p. 317; S. D. 1849, 20th December, p. 479.

support the actual decision, as for instance where three out of four reasons for the judgment are bad, but the fourth is based on a finding of facts sufficient to support the judgment.(*b*)

It must be material.

Even if the decree contains an illegal direction, this will not afford ground for special appeal if the illegal direction makes no difference in the final disposal of the case.

Thus where a decree purported to cancel the sale of certain property, and also to declare the property liable, in the hands of the purchaser, to satisfy a judgment debt of date prior to the sale, and owing to a defect of parties, the cancellation of the sale was illegal; the Sudder Court, passing by that part of the decree as mere surplusage, which could not affect the interests of the judgment creditor, rejected the application for a special appeal.(*c*)

One proposition of fact resulting from minor facts, not interfered with.

The Court of Appeal will not interfere with the finding of the Court below upon a proposition of fact which is in truth one entire proposition, though resulting from various particular facts proved in the cause.

The Courts below may conclusively find as a fact of this sort, whether the possession of a certain party has been *bonâ fide* possession or not; whether it has been a possession as proprietor or as agent; so far as the solution of this question depends only on the appreciation of the facts and circumstances of the case, or the interpretation of the exhibits filed in the cause.(*d*) So they may finally decide whether work was properly executed, or whether bodily injuries were severe.

Special appeal lies from judgment founded on inferences.

But the Court of Appeal may examine, not the main fact established by a number of minor facts, but the legal consequences of facts on which the Judge below has founded himself: it may, *e. g.*, decide whether these facts do or do not constitute a habitual state of legal imbecility.

So the Court of Appeal will judge for itself whether the lower Court has rightly found a Mahomedan to be legitimate,

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(*b*) S. D. 1847, 1st September, p. 497.

(*c*) R. S. C. 22nd April, 1848, p. 138.

(*d*) S. D. 1847, 21st August, p. 457.

upon the facts found as to his birth, and the facts found as to his acknowledgment by the alleged father.

Effect of misrecital in decree.

If the Court below finds that any document before it is null as not containing that which in fact it does contain, it has been held that the Sudder Court ought to remand the case for a more perfect investigation.

Where a decree awards land to a party, as laid down according to its boundaries in a map which is embodied in the decree, and the Judge has pronounced his opinion that the lands, as defined by the Ameen deputed to give possession, correspond with the lands laid down in the map; there can be no special appeal against the finding of the Judge, although the land defined by the Ameen falls short of the quantity awarded by the decree.(*e*)

Decree on special appeal.

If remand be necessary, the Sudder Court passes an order accordingly at the hearing; where the investigation has been complete and no remand is necessary, the Court, on special appeal, affirms or reverses the decree of the Court below, just as it would on regular appeal.

(*e*) R. S. C. 19th June, 1848, p. 142.

CHAPTER XLI.

REVIEW OF JUDGMENT BY SUDDER COURT.

Where review may be granted.

THE Sudder Court, when a petition is presented to it for a revision of a judgment of its own which has not been appealed from to the Queen in Council, (or in which, if appealed from, the proceedings have not been transmitted to the Queen in Council,) is authorized to grant the review desired, if upon a consideration of the reasons stated, the circumstances of the case shall appear in justice to require it.

The petition of review must be presented within three months from the date of the delivery or tender of the decree, or the delay must be satisfactorily accounted for, up to the date of filing the petition.(*f*)

The petition, if filed complete within three months, accompanied by all the necessary papers, may be written on paper of the value prescribed for miscellaneous petitions; whenever it is presented after that period, it must bear the stamp prescribed for petitions of appeal. But payment of the higher stamp duty will not of itself operate in any degree to obtain admission for a petition of review filed after three months, unless the delay is accounted for.(*g*)

An evident error in the decree of a former Judge of the Sudder Dewanny Adawlut may be amended without the admission of a formal review.(*h*)

The Court records on its proceedings the grounds upon which a review is granted in each instance, and it issues any

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(*f*) Reg. XXVI., 1814, Sec. 4, Cl. 3; Ibid Cl. 2, Reg. II., 1825, see as to the whole subject of the chapter, Chap XXXVII. Supra.

(*g*) Reg. II., 1825, Sec. 2, Cl. 1, Con. 490, 15th December, 1828; R. S. C. 23rd August, 1842, p. 37. Hunter and Co. *v.* Gobind Chund, Supra, p. 468.

(*h*) Supra, pp. 329, 330.

instructions which it may deem just regarding the admission or rejection of new evidence in the case.(*i*)

By whom the application is heard.

Whenever the Judge who passed the decree, or if it was passed by two or more Judges, when any of such Judges continues attached to the Court, at the time of the presentation of the petition for a review, and is not precluded, by absence or other cause, for a period of six months after the receipt of the petition, from considering and recording his order or opinion upon it, no other Judge is competent to enter upon a consideration of the merits of the petition, and record an order or opinion thereupon; it being intended that application for a review of judgment should, as far as practicable, be received and disposed of by those who passed the decision, subject to the regular course of appeal, if the case be appealable.(*j*) But this restriction is not applicable to cases not open to a further appeal, in which a single Judge may appear, on the face of the decree, to have exceeded the powers vested in him by the Regulations. In such cases the decree being imperfect and irregular, it is competent to a majority of the Judges of the Court concurring in opinion as to such irregularity, to proceed upon the petition for a review.(*k*)

In a case decided by two Judges, both of whom continue attached to the Court, the petition of review should be laid before the Judges who passed the decree; and if they do not agree as to the admission or rejection of the review, the matter should be referred to one or more Judges of the Court, until the question be determined by a majority of voices.(*l*)

It has been resolved that when, in a case decided by a single Judge, the deciding Judge shall have rejected an application for a review of the judgment, his rejection is final: unless he himself shall see grounds, on a subsequent application, to admit a review; and that it is not competent to the Court

(*i*) Reg. XXVI., 1814, Sec. 4, Cl. 3.

(*j*) Sel. Rep. 26th March, 1838, v. 6, p. 224.

(*k*) Reg. XXVI., 1814, Sec. 4; Reg. II., 1825, Sec. 3.

(*l*) Con. 756, Cal. C. 8th February, West. C. 15th March, 1835.

(such Judge being absent and incapable of hearing a second petition within six months) to authorize a review of the order rejecting the review.(*m*)

An application for a review of judgment is not cognizable by the Court after the lapse of twelve years from the date of the final decision passed in the case.(*n*)

An application to review the order rejecting the admission of a special appeal must be preferred within three months from the date of the order of rejection.(*o*)

Though the rejection of a petition of review by the deciding Judge is final, yet in one case a review was granted, upon the ground that the deciding Judge had waived his objection to the appeal being re-heard. If waiver had been necessary, the decreeholder, I conceive, and not the Judge, was the party whose waiver ought to have been obtained. The Judge in fact did not absolutely negative the review; he was unfavourable to the application, but submitted the question of review for the opinion of another Judge of the Court.(*p*)

(*m*) Con. 982, Cal. and West. C. 16th October, 1835.

(*n*) R. S. C. 25th May, 1840, p. 31.

(*o*) R. S. C. 28th September, 1842, p. 39.

(*p*) Sel. Rep. 20th July, 1836, v. 6, p. 86; See p. 94.

CHAPTER XLII.

OF ISSUING AND STAYING EXECUTION PENDING APPEAL.

Respondent cannot obtain execution without security.

IN all cases in which an appeal is allowed by the regulations, whether a first or regular appeal, or a second, or special appeal,(*q*) whatever may be the nature of the property awarded by the decree, execution can in no case be granted to the decreeholder, within the period allowed for presenting an appeal; or even after the expiration of that period, if an appeal is pending; unless the decreeholder gives security for his performance of the order of the Appellate Court.(*r*)

Amount of security, where decree for movable property.

I. Where the property awarded consists of money or other movable property :—

The security to be given by the decreeholder must be sufficient, in addition to the amount or value adjudged, to cover the interest that may be expected to arise upon the amount payable under the decree if confirmed in appeal, according to the rules for adjudging interest in such cases.(*s*)

Deposit in lieu of security.

The Court will accept,(*t*) in lieu of security, a deposit (of the kind mentioned above, p. 163,) to the required amount.

When an appeal has been presented, the appellant is entitled to apply to the Court which pronounced the decision, and to obtain from it an order for stay of execution until the appeal is decided. The appellant must in such cases give security, in like manner as has been already mentioned with respect to the decreeholder.(*u*)

(*q*) Con. 1077, West. C. 10th, Cal. C. 25th March, 1837; Reg. XXIII., 1814, Secs. 45, 46, 73.

(*r*) Cir. Ord. 28th September, 1849; Cir. Ord. 11th January, 1850, and Regulations there referred to.

(*s*) Supra, p. 458.

(*t*) Reg. II., 1806, Sec. 8.

(*u*) Supra, p.

Even if the appellant does not make this application, and does not give security, the decreeholder cannot obtain execution without security.

Pledge of the defendant's land not accepted.

It is difficult and expensive to procure security for the execution of a judgment, and hence, it would seem, arose a practice of allowing an appellant to assign or mortgage his own lands in lieu of security pending the appeal.

But the Sudder Court has disapproved of this practice. The Court observed(*v*) that the admission of such assignment is not fair to the respondent, inasmuch as it deprives him of a portion of his security; for, in the event of the appellant being cast, the respondent might always in the first instance come on his lands in satisfaction of the decree: that by the formal assignment he obtains no additional hold on them, while he is deprived of the benefit arising from the security of the land of a third party.

It has been already stated, however,(*w*) that after judgment has been given against a party, generally, and not for specific property, he retains his power to dispose of his property until the decreeholder induces the Court to attach it; and therefore it is not strictly accurate to say that by the formal assignment the decreeholder obtains no additional security. If the property of the appellant be insufficient to satisfy the amount of the decree, it will not be accepted as security, and if it be sufficient, the decreeholder cannot be prejudiced by not having the security of the land of a third person; and as an attachment can(*x*) only be obtained upon shewing by satisfactory evidence that the debtor is about to remove or to dispose of the property, it is impossible not to regard this construction as imposing a very unnecessary clog upon an obviously just and convenient arrangement.

Additional security required where previous

Notwithstanding that the appellants may have entered into the security required, the Appellate Courts are authorized,

(*v*) Con. 1024, Cal. C. 8th July, West. C. 12th August, 1836.

(*w*) Supra, p. 373; See remarks on this subject in a pamphlet by "A Pleader," Calcutta, 1849.

(*x*) Supra, p. 372.

security seems insufficient.

in cases, wherein from delay in the decision, the security so given may appear insufficient, on the application of the respondent to require any additional security which they may deem necessary to secure the decreeholder from any loss by the non-execution of the judgment during the appeal; and in default of such further security being given within a reasonable period, to be fixed for that purpose, the Court is empowered to direct the judgment to be carried into execution, taking security from the respondent.(*y*)

Decree for landed property.

II. Whenever a person claiming the proprietary right in land, houses or other immovable property, not in his possession, shall obtain a decree in his favour upon investigation of the merits in the Court of first instance, he shall obtain possession thereof in execution, notwithstanding an appeal, upon giving security in a sum equal to one year's produce of the property adjudged, if malgoozary land; or ten years' produce, if the land be lakhiraj; or the computed value, if it be a house or immovable property of any other description;(*z*) and the Court of first instance is not competent to refuse to grant him execution upon these terms.

Respondent obtains possession, giving security.

Where appellant may retain, giving security.

If, however, the Court of Appeal shall in any instance see special cause for leaving the appellant in possession during the appeal, it may pass an order to that effect, requiring from the appellant the same security as is above required to be given by the respondent.(*a*)

By the "Court of Appeal" in the foregoing paragraph is to be understood, the Sudder Court in appeals from the Zillah Judge, and in appeals in causes of five thousand rupees and upwards from the Principal Sudder Ameen; and in all other causes the Zillah Judge himself, but not the Principal Sudder Ameen to whom he may have referred the appeal for decision.(*b*)

(*y*) Reg. V., 1798, Sec. 3.

(*z*) Reg. XIII., 1808, Sec. 11, Cl. 2.

(*a*) Ibid, Cl. 3.

(*b*) Cir. Ord. 11th January, 1850.

Execution stayed by Sudder Court.

A single Judge of the Sudder Court may direct,(c) in all cases in which that measure may appear to him expedient, that the execution of any judgment or order passed by an inferior Court, may be stayed until a final decision has been passed thereon.(d)

Effect of the security.

The surety for staying, or for obtaining execution of the decree appealed against, binds himself and the property pledged, to satisfy the decree which shall be passed on the appeal, whosoever, at the time of its being passed, shall stand in the place of appellant or respondent; and consequently it is unnecessary, when the death of an appellant, respondent or surety happens, pending an appeal, to incur the delay and inconvenience which would be occasioned by calling for fresh securities.(e)

Practice where disputed property is advertised for revenue sale.

The Indian revenue system, having regard to the public interests only, peremptorily exacts certain annual payments, under the penalty of seizure and sale of the land in respect of which the payment ought to be made. In order to prevent this rule from operating unjustly between litigants by enabling the party who is in possession of the land in question during an appeal, to cause its forfeiture by withholding payment of the sum due to the Government on account of revenue, it has been enacted that whether the appellant or the respondent be left in possession of land paying revenue to Government, during an appeal, if the party in possession of such land shall neglect to pay the revenue due upon the assessment, and a public sale shall in consequence be ordered to take place; the party not in possession, by payment of the revenue due, and

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(c) Reg. IX., 1831, Sec. 2, Cl. 5.

(d) See Reg. V., 1793, Secs. 12 and 14.
Reg. VI., 1793, Secs. 10 and 12.
Reg. XIII., 1796, Sec. 2.
Reg. V., 1798, Secs. 3 and 6.
Reg. XIII., 1808, Secs. 11 and 12.
Reg. V., 1831, Sec. 22.
Reg VII., 1832, Sec. 7.

(e) Cir. Ord. Cal. and West. C. 13th July, 1832.

giving the prescribed security, previously to the sale, shall be put in immediate possession; and shall be entitled to charge the amount so paid, with interest thereupon, at the rate of one per cent. per mensem, in any adjustment of accounts which may be directed in the final decree in the cause.(*f*)

Rules regarding the disputed land during appeal.

In all instances wherein the plaintiff in a Zillah Court may obtain a judgment in his favour, for land or other real property, and the defendant appealing therefrom to the Sudder Court may be left in possession of the property, under the security prescribed by the regulations; any private transfer of such property by sale, gift or otherwise, or any mortgage thereof which is made by such appellant during the appeal to the Sudder Court, will, in the event of the judgment against him being confirmed on appeal, be null and void.(*g*)

Where land is sold for revenue;—
1. To respondent.

But whenever any land or other property, for which a judgment may have been obtained, but which may during appeal be left in the possession of the appellant, shall, while such appeal is pending, or before the ultimate judgment thereon be put in execution, be sold by Government to make good an arrear of the public revenue due from the appellant; and shall be purchased by the respondent; the party so purchasing, in the event of such property being finally adjudged to him on the appeal, shall be entitled to recover from the appellant, so left in possession, the full amount of his purchase-money and of all expenses attending the purchase so made by him, with interest at the rate of twelve per cent. per annum; in addition to any other sum which may be adjudged due to him on account of the profits arising from the land, or other property in question, anterior to the sale.(*h*)

2. To a stranger.

In the case above supposed, if the respondent shall not have purchased the land, or other property, sold by Govern-

(*f*) Reg. XIII., 1808, Sec. 11, Cl. 4.
(*g*) Reg. V., 1798, Sec. 4, Ced. and Conq Prov Reg IV., 1803, Sec. 14, Cl. 1.
(*h*) Ibid.

ment, to make good an arrear of public revenue due from the appellant left in possession thereof, and if the ultimate judgment on the appeal be in favour of such respondent, he shall be entitled to recover from the appellant left in possession the amount of the purchase-money paid for the property so sold, and adjudged to the respondent; with interest thereon at the rate of twelve per cent. per annum, in addition to any other sum which may be adjudged to him on account of the profits arising from the property so sold anterior to the sale of it; unless the property in question shall have been, directly or indirectly, purchased by the appellant himself, or on his behalf, at the public sale; in which case, on clear proof thereof being made by the respondent, to whom such property may be ultimately adjudged, he shall be entitled to the possession thereof, and to all profits arising therefrom, as may be directed by the decree in the case, notwithstanding the fictitious sale supposed.(*i*)

3. To the appellant himself.

An inquiry into a plea of fictitious purchase made by a party to the suit, after judgment passed, must be had in a new action under Section 4, Regulation V., 1798, and not in a mere proceeding to carry out the original intentions of the Court passing the decree.(*j*)

Fictitious purchase.

The principles of the rules above stated are equally applicable to cases in which the plaintiff may be put in possession of land, or other property adjudged to him, during an appeal, in consequence of the defendants failing to give security for staying execution, and generally to all cases in which the possession of property may be transferred by the decree of any Court of Justice, from which decree an appeal may be depending in a superior Court, whether the Sudder Court or that of Her Majesty in Council.(*k*)

As cases may occur wherein neither the appellant nor the respondent may be able to give the prescribed security for

Land attached during appeal.

(*i*) Reg. V., 1798, Sec. 4, Ced. and Conq. Prov.; Reg. IV., 1803, Sec. 14, Cl. 1.
(*j*) R. S. C. 13th June, 1840, p. 32.
(*k*) Reg. V., 1798, Sec. 5.

staying the execution of decrees, or for the execution thereof in favour of the plaintiff, it has been enacted that in all such cases, the property adjudged, shall be held in attachment during the appeal, until one of the parties may be able to give the required security, by the Collector of the district wherein the land may be situated, at the expense of the party who may be ultimately declared entitled thereto, and under the provisions contained in Regulation XLV., 1793, relative to the attachment of lands for sale in pursuance of decrees of the Courts of Justice, as far as the same are applicable.(*l*) No attachment, however, is to be made by any Collector in the cases supposed, until he receives a precept, requiring him to make the same, from the Court wherein the original judgment may have been passed; which precept shall state specifically the property to be included in the attachment, and shall require the Collector to continue the same till ordered to be withdrawn by a further precept from the Court, to be issued either on the prescribed security being given by one of the parties, or on the cause being finally determined.(*m*)

Rules regarding the property which is pledged as security, pending an appeal.

The Judges of the several Courts, by which security may be taken from appellants or respondents, for performing the decrees to be passed on appeals, are enjoined to be particularly careful in ascertaining the security received is good and sufficient; and they are required, in all cases, to cause the Nazir or other officers, by whom the property of the sureties may be ascertained, to deliver in as accurate a statement as can be obtained of such property; with a full report of the inquiry made respecting it, informing him, at the same time, that he will be held responsible for any wilful misrepresentation in his statement or report.(*n*)

Inquiry as to security.

All persons who may enter into security bonds for the execution of the decrees of the Civil Courts, or for staying the execution of judgments in civil suits pending an appeal,

(*l*) Supra, p. 377.

(*m*) Reg. V., 1798.

(*n*) Reg. XIII., 1808, Sec. 13; R. S. C. 15th April, 1841, p. 5; Supra p. 365.

are prohibited from transferring, by sale, gift, mortgage or otherwise, any land or other immovable property belonging to them, and specified in the schedule of property on which their security may have been accepted, until the object of their security shall have been completely fulfilled.(o)

How far land pledged to the Court may be alienated.

This prohibition, however, does not affect the legality of any private transfer or mortgage of such property, in cases in which the amount of any demand on the surety, which may eventually arise under the terms of the security bond, shall be duly discharged by him; but no private transfer or mortgage of such property which may be made by a surety in the interval between the execution of the security bond and the final and complete enforcement of the judgment, is considered to bar the prior right of the Court to hold the whole or any part of such property answerable in the first instance for the amount of any demand upon it, which may eventually arise under the terms of the security bond, and which may not be duly discharged by the surety.(p)

Where property has been pledged as security for execution of a decree, it cannot be sold or otherwise disposed of freed from the Court's lien, until the appeal is determined in favour of the respondent, or, in the event of a decision being passed in favour of the appellant, until it shall have been fully satisfied by the respondent.(q)

Rules to prevent fraudulent transfers.

In order, therefore, to enable individuals to ascertain whether property is hypothecated to the Courts, and with a view to check fraudulent transfers, the Sudder Court have considered it(r) proper to adopt the following rules:—

1st. Whenever a person shall pledge his land or immovable property to the Court as security, the Nazir, after he has satisfied himself of the sufficiency thereof, shall recapitulate the contents of the title deeds in his kyfeat, stating that he has

(o) Reg. XXVI., 1814, Sec. 13.

(p) Reg. XXVI., 1814, Sec. 13, Cl. 3.

(q) Con. 659, 30th September, 1831.

(r) Cir. Ord. Cal. and West. C. 17th February, 1837.

inspected them and that they are sufficient. 2nd. The Nazir shall also keep a register of all property pledged as securty, and shall allow to persons desirous of ascertaining whether any particular property is pledged to the Court, an opportunity of inspecting the register.

Rule where pledged lands are sold for revenue.

Whenever estates paying revenue to Government are pledged to the Court, a notification of the same shall be made to the Collector, with a request that in the event of a sale for arrears of public revenue, he will hold the surplus proceeds in deposit, until the Court shall report that the security is released from responsibility.(s)

(s) Cir. Ord. Cal. and West. C. 17th February, 1837, para. 3.

CHAPTER XLIII.

EXECUTION OF DECREES OF COURTS OF APPEAL.

Application for execution is presented to Court of first instance.

IF the decision of a Sudder Ameen or a Moonsiff has been the subject of appeal, and has not been executed pending the appeal, the application for execution is presented(*t*) to the Court of original jurisdiction, together with a certified copy of the decree of the Court.

The decision of the Zillah Judge, upon all appeals from orders passed by a Sudder Ameen or a Moonsiff, in execution of the decree of an Appellate Court, is final.

Application for execution of Sudder decrees received by Deputy Register.

Applications for the execution of decrees of the Sudder Court, are received in the first instance by the Deputy Register,(*u*) who after examination records in a proceeding, for the information of the decreeholder, any errors that may appear in the application. Should any objection arise or be raised to the execution, or should the application for execution proceed from any other than the person or persons named in the decree as the party in whose favour the decree was given, the Deputy Register must lay the case before the Judge selected as referee.(*v*)

Sudder decree sent to Court, whose decree was appealed from.

The Sudder Court has recently issued the following rules as to the manner in which applications for execution of its decrees are to be disposed of, after all errors have been corrected, and when the case is deemed ripe for execution.(*w*)

(*t*) Act VI., 1843, Sec. 5.

(*u*) Act XVII., 1841; Rules Sudder Dewanny Adawlut, 21st January, 1842.

(*v*) Rules Sudder Dewanny Adawlut, 21st January, 1842.

(*w*) Cir. Ord. 9th August, 1850.

N. B.—I have, for the sake of convenience, transposed the first and second rules.

Regular appeal to Sudder Court in execution of its own decrees.

1. The decrees of the Sudder Dewanny Adawlut passed on regular or special appeals, are henceforth to be sent by it for execution to the Zillah Judge or Principal Sudder Ameen, according to the Court in which the decree appealed against was passed. Appeals from orders of Principal Sudder Ameens, in all cases of execution of decrees of the Sudder Dewanny Adawlut, so remitted to them for execution, shall lie to the Sudder Dewanny Adawlut.

2. If on notice being issued(*x*) to the party against whom execution of a decree of the Sudder Dewanny Adawlut has issued, objections are made by such party, they shall in the first instance, be disposed of by the Court issuing the notice, subject to the direction contained in the third rule, and to appeal to the Sudder Dewanny Adawlut.

3. All cases of execution of decrees of the Sudder Court in appeal either from decisions of the Zillah Judges or of the Principal Sudder Ameens, which have been already referred to the Principal Sudder Ameens, and are still pending before them, shall be recalled by the Judges and disposed of by them, so that there may be a regular appeal in execution, as to all matters of its own decrees, to the Sudder Dewanny Adawlut.

Upon such appeal, a single Judge of the Sudder Court is competent to reverse an order passed by the Zillah Judge.(*y*)

Dismissal of application by lower Court on default.

Where an application for execution has been thus sent down to a Zillah Court, and has, after due notice to the decreeholder, been dismissed on default, in consequence of the neglect of the party to proceed in the matter within the period allowed, the Zillah Judge is not competent of his own authority to re-admit(*z*) the case. His proper course is immediately to return to the Sudder Court the precept issued to him in the matter, certifying the execution of it, as far as lay in his power, as well as what he may have done in pursuance of the Court's orders; and if the decreeholder

(*x*) Supra, p. 351.

(*y*) Con. 804, West. C. 19th July, Cal. C. 16th August, 1833.

(*z*) Cir. Ord. Cal. C. 7th, West. C. 21st December, 1838.

should subsequently renew his application, he should be referred to the Sudder Court which alone is competent to direct the re-admission of the suit on the file of the lower Court.

Applications for the revival of decrees of the Sudder Court, struck off on default, are referred to the Deputy Register; who admits the applications, if they be made within twelve years from the date on which the application for execution was struck off, and if no objection be raised by the opposite party; or refers them to the Judge who has been appointed as referee, should any objections exist.(*a*)

(*a*) Rules Sudder Dewanny Adawlut, 31st March, 1845.

N. B.—The following Circular, (dated the 30th March, 1850,) has been addressed by the Sudder Dewanny Adawlut of Calcutta, to the Civil Judges in the Lower Provinces.

"1st. The Court, having had under consideration a suggestion for altering the law, regarding the execution of decrees, are desirous to have the opinion of the Zillah Judges upon it before proposing any alteration of the course of procedure at present in force.

"2nd. Section 7, Regulation IV., 1793, directs a decree 'for a zemindaree, independent or dependent talook, or other estate or real property' to be executed 'by causing possession of the property to be delivered to the person to whom it may be decreed;' and, again, by Sections 3 and 4, Regulation VII., 1825, summary investigations are made into claims preferred to property advertised for sale. Both the delivery of possession of property decreed, and the adjudication of claims to property proposed for sale, give rise to many actions, which, although summarily decided in the first instance, become subsequently, in most cases, the subject of regular suits. It has been urged that it is superfluous to have a summary decision open to a summary appeal, and this again open to a regular suit and subject again to a regular and special appeal, *i. e.*, to five decisions on one point, and that it would be a preferable and sufficient mode of executing a decree for landed property to notify by proclamation, on the spot, the fact of its having been passed, and that the decreeholder had succeeded to the rights of the party cast, or, (in the case of sale in execution of a decree) to notify similarly that the right and title of the debtor had been bought by the purchaser. By this mode of procedure all subsidiary questions, as between the decreeholder or purchaser and any other parties, would be left to be determined in the ordinary course of law, with the provision only, which it would be proper to enact by law, that such decreeholder or purchaser shall succeed to, and have vested in him, all rights of possession appertaining to the party cast or sold out, and therefore, shall be entitled to the assistance of the Magistrate under Act IV., 1840, for the protection of the possession thus devolving upon him, in like manner as the party would have been to whose rights he had succeeded.

"3rd. The present system by which, in execution of a decree, many questions of right to land or other property are raised and summarily decided, although quite distinct from the controversy between the parties to the suit on which the decree passed, is one which is understood to be carried in our Court to an extent unknown under the judicial practice of other countries. The facility which the system affords to the bringing forward of all kinds of fraudulent or unfounded claims to property affected by a decree, is believed to be a source of much practical abuse and of vexatious occupation of the time of the Judicial Officers.

"4th. On the other hand, the system is one nearly coeval with the existence of our Courts, and where claims are preferred *bonâ fide* to property seized in execution, a careful enquiry, though in a summary form of procedure, may often obviate the necessity for the delay and expense of a regular suit.

"5th. You are requested to take the above remarks into your attentive consideration, and to report your opinion as to the expediency of any change of system, after consulting with the Principal Sudder Ameen of your district, and with any other of the Native Judges whose experience and character may render it probable that they can give useful aid in the determination of the question."

CHAPTER XLIV.

DEFAULT IN APPEALED CASES.

Rules of default in original suit applicable to appeals.

THE provisions of Act XXIX., 1841, stated above,(*b*) apply to appellants (in whatever Court,) and to the representatives of appellants, just as they do to plaintiffs and their representatives, and the provisions relating to defendants are equally applicable to respondents.

Notification to heirs of deceased party.

The rules laid down(*c*) for notifying the death of a plaintiff and calling upon his heirs to proceed in the suit, embrace all appeals, pending in the Zillah Court; they are also applicable to appeals pending in the Sudder Court, with the exception that the publication therein prescribed shall, in such cases, be affixed in the Cutcherry of the Sudder Court, and in the Cutcherries of the several Judicial authorities included in the district or districts from which the pending appeals may have been received, and that the Zillah Judges shall, on receipt of a precept to that effect, cause the said publication to be duly affixed in the places appointed, and certify with all practicable expedition the due fulfilment of such order, for the satisfaction of the Sudder Court.(*d*)

Relaxation of Act XXIX., 1841.

Act XXIX., 1841, having been found inconveniently severe as regards appeals, it was provided by Act XVI., 1845, that whenever an appeal in any of the Courts has been dismissed under the provisions of Act XXIX., 1841, the same Court may re-admit the case if the appellant shall make application for that purpose (on the stamp prescribed for miscellaneous petitions,) within three months after the dismissal,

(*b*) Supra, p. 420.

(*c*) Supra, p. 422. Cir. Ord. 5th September, 1845.

(*d*) Ibid, para. 4.

if the appeal were dismissed by the Sudder Court, and within one month after the dismissal, if by any other Court, and if he shall satisfy the Court that the dismissal was occasioned by the default of his Vakeel or by unavoidable accident.(*e*)

Not applied twice to same case.

No appeal which has been re-admitted under the Act last mentioned and again dismissed under the provisions of Act XXIX., 1841, can be again re-admitted.(*f*)

Mere appointment of a Vakeel does not save from default.

An appellant is held to have defaulted, and is liable to the dismissal of his appeal) unless he appears in person or by Vakeel and files his reasons of appeal within the term (six weeks) allowed. The mere appointment of a Vakeel will not suffice to bar this liability.(*g*)

Default of one appellant does not prejudice others.

Where one of two appellants, (or after his decease, his heir, having appeared,) makes default, the Court must still hear the appeal on its merits, so far as regards the appellant who has not committed default.(*h*)

Time not granted retrospectively.

The Courts cannot legalize a default by granting retrospective sanction for excess of time.(*i*)

A default cannot be considered as cured under Act XVII., 1847, merely through the omission of the presiding Judge to notice objections distinctly urged against it.(*j*)

Default by not appointing new Vakeel.

The rules which require parties in original suits to appoint in certain cases a new pleader in the room of the original pleader, apply also to appeals.(*k*)

(*e*) Act XVI., 1845, Sec. 1.

(*f*) Ibid, Sec. 3.

(*g*) Con. 1315, Cal. C. 31st December, 1842, West C. 7th January, 1842.

(*h*) R. S. C. 2nd July, 1843, p. 50.

(*i*) S. D. 1849, p. 430.

(*j*) Supra, p. 423; S. D. 1849, p. 430. As to the manner in which the Sudder Court and its Officers execute the provisions of the Act XXIX., 1841, see Rules of Sudder Dewanny Adawlut 21st January, 1842.

(*k*) Supra, pp. 341-44; Reg. XXVII., 1814, Sec. 18, Cl. 3; See above pp. 111, 157, 159, 162, 180, 213.

CHAPTER XLV.

PAUPER APPELLANTS AND RESPONDENTS.

THE manner in which permission to sue and to defend as a pauper may be obtained, and the advantages and disadvantages of this mode of litigating, have been already stated.(*l*)

1st. Appeal in f. p. :— Cannot be without permission of Appellate Court.

A person who has been admitted as a pauper in the Court of first instance, does not thereby become entitled to proceed as a pauper to the end, through all the stages of appeal, but he must obtain permission from the Appellate Court to sue in appeal as a pauper; and so must a person who desires to appeal as a pauper from a decree pronounced in a suit in which he has not sued as a pauper in the Court below.(*m*)

Application to Appellate Court.

If any party to an original suit be desirous of appealing *in formâ pauperis* from the decision passed in such suit, he must present a petition in the mode already mentioned, to the Court by which his appeal is regularly cognizable.(*n*)

The rule by which females of rank are excused from personal attendance in Court, on the presentation of a petition to sue as a pauper, is applicable, at the discretion of the Sudder Court, to any party desirous of appealing to it *in formâ pauperis*, as for instance a prisoner confined under the sentence of a Criminal Court.(*o*)

The petition is accompanied by an authenticated copy of the decree, and it must contain a Schedule of the whole real and personal property of the petitioner, and its estimated

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(*l*) Supra, pp. 6, 11, 109, 178, 339, 340, 344, 425.

(*m*) Con. 1207, Cal. C. 1st, West. C. 26th April, 1839.

(*n*) Supra, p. 7; Reg. XXVIII., 1814, Sec. 12, Cl. 1.

(*o*) Supra, p. 7; Act XIX., 1840; R. S. C. 31st May, 1842, p. 32.

value, together with a statement of the specific grounds on which the petitioner desires to appeal.(*p*)

What documents pauper may have on plain paper.

A pauper plaintiff dissatisfied with any interlocutory order, passed while his suit is pending, and desirous of appealing therefrom to a Court of higher jurisdiction, is entitled (if the order be appealable) to the privilege of obtaining a copy, on plain paper, of the order or proceeding against which he intends to appeal.(*q*)

The immunity from stamp duty is restricted to the order or proceeding from which the appeal is preferred, and does not include copies of documents and other papers which paupers, appealing, may be desirous of filing therewith, in support of the objections taken by them to such proceedings or orders. It is considered by the Court that this restriction can never operate with hardship on the pauper preferring the appeal, as the appellate tribunal has authority to call officially for such papers, as it may deem requisite, to elucidate any point not satisfactorily explained by the copy of the order appealed from.(*r*)

An application from a pauper appellant to stay the execution of the decree given against him, pending the appeal, is not admissible on plain paper, but must be drawn out on stamped paper of the value prescribed for petitions presented to the Courts in which they may be filed, as is the case with vakalutnamahs where the pauper himself appoints a Vakeel, and with the security bonds of paupers.(*s*)

Copies on plain paper of any orders passed in the execution of a decree, which a pauper in the Court whence it may have issued would be required by law, in the event of his appealing from such orders to the superior Court, to file with his petition of appeal, are obtainable by him on unstamped paper.(*t*)

(*p*) Ibid, Cl. 2.

(*q*) Cir. Ord. Cal. and West. C. 1st November, 1839, para. 2; Supra, pp. 465, 486.

(*r*) Cir. Ord. Cal. and West. C. 1st November, 1839.

(*s*) Con. 1132, West. C. 16th February, Cal. C. 9th March, 1838; Reg. XXVIII., 1814, Sec. 8; Supra, pp. 11, 109, 178.

(*t*) Cir. Ord. Cal. and West. C. 1st November, 1839.

Copies of the proceedings and judgments of the Sudder Court in appeal to the Queen in Council, which are required in ordinary cases to be written on stamped paper of a prescribed value, are furnished without expense on unstamped paper to pauper parties.(*u*)

Application considered on the merits.

If, upon a perusal of the petition and the copy of the decree, the original judgment does not appear to the Court to be erroneous or unjust, or if the nature of the cause shall not appear to be of sufficient importance to merit a further investigation in appeal, the Court will reject the petition and will refuse to admit the petitioner to sue in appeal as a pauper.(*v*)

An order passed by the Zillah Judge, refusing permission to a party to appeal *in formâ pauperis*, is final, and not open to appeal to the Sudder Dewanny Adawlut.(*w*)

Effect of refusal of application.

The petitioner, even if he fails to obtain permission to appeal as a pauper, is entitled to institute his appeal on performing the conditions of appeal prescribed by the Regulations for persons not suing as paupers.(*x*)

Where the petition of a pauper party in the Court below for leave to appeal as a pauper, has been rejected by the higher Court for want of apparent merits, not from its disbelief in the pauperism of the petitioner, the latter may appeal on the ordinary terms, and having received back his copy of the decree of the inferior Court which he obtained on plain paper, he may file it along with his new petition of appeal.(*y*)

The Sudder Court will not, under ordinary circumstances, listen to an application to appeal *in formâ pauperis*, preferred by a party who would not defend in the lower Court.(*z*)

If, upon the perusal of the petition for leave to appeal as a pauper, and of the copy of the decree, the Court shall be of

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(*u*) Reg. XXVIII., 1814, Sec. 18.

(*v*) Ibid. Cl. 3.

(*w*) Reg. XXVIII., 1814, Sec. 12, Cl. 3; R. S. C. 13th June, 1842; p. 32; Sel. Rep. 16th January, 1826, v. 4, p. 104.

(*x*) Reg. XXVIII., 1814, Sec. 12, Cl. 4.

(*y*) Con. 1217, West. C. 17th May, Cal. C. 21st June, 1839.

(*z*) R. S. C. 13th April, 1842, p. 27.

opinion that there is reason to believe the judgment to be erroneous or unjust, or that the nature of the cause renders it deserving of a further investigation in appeal, the Court is empowered to admit the appeal, on being satisfied of the fact of pauperism in the same way, and taking the same surety bond as when a plaintiff is admitted as a pauper in an original suit, and all that has been said above of pauper plaintiffs, is applicable to pauper appellants.(*a*)

Effect of admission of application.

Paupers are allowed to appeal to the Sudder Dewanny Adawlut within three calendar months from the date of the decision, and the three rules stated above, at p. 476, do not apply to them.(*b*)

2nd. Appeal against decision in favour of pauper plaintiff.

If a decision be passed in any original suit in favour of a pauper plaintiff, and the adverse party appeal from such decision, the pauper plaintiff, thus made respondent in appeal, is not obliged to establish his poverty or the merits of his case, but the rules laid down as to pauper plaintiffs become at once applicable to him in the appeal, provided that the execution of the original decree shall have been suspended during the appeal.(*c*)

If a decision in favour of a pauper plaintiff be reversed in appeal, the amount of the stamp duty (substituted for the institution fee) which may have been paid by the appellant, is returned to him by the Court, and the amount of such stamp duty as well as all other costs and expenses which may be awarded in the decree against the respondent, is recovered from any property which the respondent may, at any time, be found to possess.(*d*)

The law as to pauper respondents (except in the case already provided for,) is precisely the same with the law as to pauper defendants.(*e*)

(*a*) Reg. XXVIII., 1814, Sec. 13.

(*b*) Act XXX., 1850. See Civil Guide, p. 701.

(*c*) Supra, pp. 9, 109, 178, 342; Reg. XXVIII., 1814. Sec. 14.

(*d*) Ibid, Sec. 15.

(*e*) Reg. XXVIII., 1814, Sec. 16; Supra, p. 178.

The provisions already stated, respecting appeals *in formâ pauperis* from decisions passed in original suits, are also applicable to any second or special appeals which may be preferred *in formâ pauperis*, and which may be deemed admissible under the rules by which special appeals are governed.(*f*)

Exemption of respondent from stamp duty where pauper appellant.

The defendant in a suit instituted by a pauper is permitted to file on unstamped paper his pleadings and all other papers for which a stamp is in ordinary cases required;(*g*) and this exemption applies equally to the respondent in an appeal brought by a pauper.(*h*)

A decision passed in favour of a pauper plaintiff by the lower Court cannot be appealed against by the defendant (not a pauper) by a petition on plain paper. But the appealing defendant is allowed a copy of the lower Court's decree on plain paper, for presentation with his petition of appeal.(*i*)

Orders passed by the Zillah Judges under Section 1, Act IX., 1839, rejecting applications to sue originally *in formâ pauperis*, are appealable to the Sudder Dewanny Adawlut.(*j*)

(*f*) Reg. II., 1825, Sec. 5.

(*g*) Act IX., 1839, S. 2. N. B.—This ought to have been stated at p. 183, Supra.

(*h*) Con. 1250, 13th September, 1839.

(*i*) Con. 1314, Cal. C. 10th December, 1841, West. C. 10th January, 1842.

(*j*) Con. 1356, Cal. C. 22nd July, West. C. 19th August, 1842.

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